S. Hrg. 101-412

ADMINISTRATION OF INDIAN PROGRAMS BY THE ENVIRONMENTAL PROTECTION AGENCY

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON THE ADMINISTRATION OF INDIAN PROGRAMS BY THE ENVIRONMENTAL PROTECTION AGENCY

JUNE 23, 1989
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE
24-574 WASHINGTON : 1990

S 411-8

SELECT COMMITTEE ON INDIAN AFFAIRS

DANIEL K. INOUYE, Hawaii, *Chairman*
JOHN McCAIN, Arizona, *Vice Chairman*

DENNIS DeCONCINI, Arizona
QUENTIN N. BURDICK, North Dakota
THOMAS A. DASCHLE, South Dakota
KENT CONRAD, North Dakota
HARRY REID, Nevada

FRANK H. MURKOWSKI, Alaska
THAD COCHRAN, Mississippi
SLADE GORTON, Washington

Alan R. Parker, *Staff Director*
Patricia M. Zell, *Chief Counsel*
Eric Eberhard, *Minority Staff Director/Counsel*

CONTENTS

Page

Statements:

- Duprey, Robert, Acting Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, EPA, Washington, DC 36
- Garcia, Nora, first vice president, Inter-Tribal Council of Arizona, Inc., Phoenix, AZ 28
- Habicht, F. Henry, III, Deputy Administrator, U.S. Environmental Protection Agency, Washington, DC 3
- Harjo, Suzan, executive director, National Congress of American Indians, Washington, DC 26
- Hayes, Patrick, Acting Deputy Assistant for Indian Affairs for Trust and Economic Development, U.S. Department of the Interior, Washington, DC 12
- Inouye, Hon. Daniel K., U.S. Senator from Hawaii, chairman, Select Committee on Indian Affairs 1
- Kohler, Dale, chairman, Law and Justice Committee, Confederated Tribes of the Colville Reservation, Nespelem, WA 16
- Lester, David, executive director, Council of Energy Resource Tribes, Denver, CO 24
- Pearson, Bill, Associate Director, IHS, Office of Environmental Health and Engineering 8
- Persell, John, director, Water Research Laboratory, Minnesota Chippewa Tribe, Cass Lake, MN 21
- Rasmussen, Paul, Director, Office of Program Management, Office of Air and Radiation, EPA, Washington, DC 33
- Rhoades, Dr. Everett, Director, Indian Health Service, Rockville, MD 8
- Sanderson, Richard, Director, Office of Federal Activities, Office of External Affairs, EPA, Washington, DC 37
- Whittington, William, Acting Deputy Assistant Administrator, Office of Water, EPA, Washington, DC 34

APPENDIX

Prepared statements:

- Anderson, Julie, Native American Sites Committee (with attachments and letter) 392
- Gahbow, Arthur chief executive, Mille Lacs Band of Chippewa Indians 406
- Garcia, Nora 382
- Habicht, F. Henry, III (with attachments) 39
- Harjo, Suzan 376
- Hayes, Patrick (with letter and questions and answers) 188
- Kohler, Dale (with attachments) 211
- Lester, David 368
- McCain, Hon. John, U.S. Senator from Arizona, vice chairman, Select Committee on Indian Affairs 411
- Murphy, Charles, chairman, Standing Rock Sioux Tribe (with resolution) 413
- Rhoades, Dr. Everett (with questions and answers) 166
- Shoshone-Bannock Tribes, Fort Hall Reservation, ID 419
- Wadena, Darrell, Minnesota Chippewa Tribe (with attachments) 357

Additional material submitted for the record:

- Burch, Leonard, chairman, Southern Ute Indian Tribe, letter 432
- Clark, Krista, Attorney, Dakota Plains Legal Services (with attachments). 435
- Environment Protection Agency Indian Policy and Recent Legislative Developments, Eric Eberhard, paper 466
- Fort Peck Tribes, letter 208
- Wind River Indian Reservation Summary of Tribal Concerns Regarding EPA's Activities, with Analysis and Perspective 550
- Tribal Civil Regulatory Jurisdiction to Enforce Environmental Laws, Jana L. Walker and B. Kevin Gover 505
- Zuni Pueblo documents 202

ADMINISTRATION OF INDIAN PROGRAMS BY THE ENVIRONMENTAL PROTECTION AGENCY

FRIDAY, JUNE 23, 1989

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 2:04 p.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye and McCain.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Welcome to this oversight hearing on the policies of the United States Environmental Protection Agency with respect to environmental issues on Indian reservation lands.

In 1984, EPA adopted as Indian policy a unique document that recognizes the government-to-government relationship between the United States and Indian tribes. The policy states that the EPA will assist tribes in assuming regulatory control over Indian lands in addition to policy costs for EPA to remove any legal barriers to working directly with tribes and to assuring compliance with environmental laws on Indian lands.

The purpose of today's hearing is to receive testimony from the EPA, from Indian tribes, and from national Indian organizations about the manner in which EPA has implemented its Indian policy. The committee will also receive testimony from witnesses regarding the interaction of the EPA, IHNs in this area.

The committee is charged with the responsibility to oversee the administration of environmental law on Indian lands. This hearing is a result of deep concerns expressed throughout Indian country about reservation environments and the widely-held perception that not enough is being done to address environmental problems on Indian lands.

This is the committee's first hearing on the subject since it was formed in 1977, but other hearings will follow at the regional level.

The issues are obviously critically important to all of us, but particularly to the Indian tribal governments who are responsible for maintaining viable, permanent homelands for their people. The historical disparity between the financial and technical assistance that EPA provides to States and the assistance that it has provided to tribes is significant.

Now, when less funding is available and the method of funding is changing, tribes are finally able to participate as full partners. Once again, for tribes it may be too little too late.

We all hope that this hearing will bring the necessary focus to these issues regarding tribal regulation of reservation environments, as fully supported by the agencies responsible for providing the training, technical assistance, grants, and other support that is needed.

We will question our first panel of Administration witnesses in two phases: first, the EPA witness on matters solely within the jurisdiction of the EPA; and then the EPA witness and representatives of the IHS and BIA on issues of concern to all three agencies as they coordinate and work together to provide needed assistance to tribes.

The next panel consists of tribal witnesses, followed by a panel of representatives of national Indian organizations. Our last panel will be program or media people from EPA who are prepared to respond to questions that will be raised by the participants in the panels which proceed them.

Before I call upon our first witness, I am pleased to recognize my very distinguished colleague from Arizona, the vice chairman of this committee, Senator McCain.

Senator McCAIN. Thank you very much, Mr. Chairman.

I am pleased that we are holding this hearing today. Despite years of hard work by dedicated tribal and Federal employees, I think there is abundant evidence that environmental quality on Indian lands is deteriorating. For the most part, the tribal governments were overlooked in the early Federal efforts to regulate environmental quality.

As you noted, Mr. Chairman, in 1984 EPA became the only Federal agency to adopt a formal policy for the implementation of President Reagan's Indian policy.

In 1986 and 1987 the Congress adopted amendments to Superfund, the Safe Drinking Water Act, and the Clean Water Act to authorize EPA to treat tribes as States.

I'm hopeful that during this Congress similar amendments will be adopted for the Clean Air Act and the Resource Conservation and Recovery Act.

All indications are that things are not going as well as they should in tribal and Federal efforts to establish environmental regulatory programs on Indian lands. EPA apparently lacks adequate funds for this effort.

We have received numerous complaints from tribes which suggest that serious threats to reservation environments are not being addressed by BIA, IHS, or EPA. Tribal efforts in this area have apparently been frustrated by the lack of coordination and the lack of direction within these Federal agencies.

Many tribal governments have indicated a need for Federal assistance in the development of their capacity to establish and operate effective environmental regulatory programs. We have also received indications that some unscrupulous parties have attempted to exploit Indian lands in the apparent belief that they can degrade the environment without regard to established environmental standards.

Mr. Chairman, at your suggestion and insistence, recently there was a meeting on these issues that was held directly with the EPA Administrator, Mr. Reilly. Unfortunately, because you were chairing an Appropriations Committee hearing, you were unable to be there. I am pleased to report to you, for the record, that Mr. Reilly said that he is aware of these problems and the concerns of the tribes. I am more pleased to report to you of his pledge to correct the lack of adequate environmental protection on Indian lands. I look forward to you and I working with Mr. Reilly on these matters.

Once again, I want to express my thanks to the chairman of this committee for his leadership. This hearing is the first of its kind. No committee of the Congress has ever inquired into these matters. It is entirely consistent with Chairman Inouye's deep commitment to the welfare of Native Americans that we are here today. I hope that this will be the first in a regular series of hearings on these matters.

Thank you, Mr. Chairman.

The **Chairman**. I thank you very much, Senator McCain—especially for your kind words. I am certain that Indian country would be much comforted to receive your report on your meeting with Mr. Reilly.

The first panel of witnesses consists of: Mr. F. Henry Habicht, III, Deputy Administrator, U.S. Environmental Protection Agency; Doctor Everett R. Rhoades, Director of the Indian Health Service, and; Mr. Patrick A. Hayes, Acting Deputy Assistant for Indian Affairs—Trust & Economic Development, U.S. Department of the Interior.

Gentlemen, welcome. I thank you very much for participation this afternoon.

May I first call upon the Deputy Administrator of EPA?

STATEMENT OF F. HENRY HABICHT III, DEPUTY ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, DC

Mr. **Habicht**. Thank you very much, Mr. Chairman and Senator McCain.

I had the privilege of taking part in that meeting with Senator McCain and the Administrator, and we do have cause for optimism. I think we're off to a good start on these issues, but it is certainly not an easy road, and it is one that we all have to be pulling together on. I applaud the committee and the chairman for calling this first hearing of its kind, in our understanding, and hopefully the beginning of a good and productive dialogue on these issues.

We are glad for the chance to discuss where we see EPA going with Bill Reilly and our work with the team there and with the other agencies in the Federal Government.

With your leave, Mr. Chairman, I have a written statement that talks about our plans in detail that I'd like to submit for the record.

The **Chairman**. I assure all that your prepared statements will be made a part of the record, in total. It will appear in the record immediately following your oral remarks.

Mr. **Habicht**. Thank you.

I would like briefly to share some general thoughts with the committee, and then leave time for discussion.

As you know, and as you both have observed, EPA moved quickly in 1984 to implement the President's 1983 government-to-government strategy outlined in the Indian policy in 1983 of President Reagan's Administration. We have taken that government-to-government approach to dealing with Indian tribes very seriously.

Our main message today is that we want to build on the experience we have had in the last few years in putting this strategy together—certainly better late than never. And our goal is to have an effective and an integrated Indian policy with regard to environmental protection in the years ahead.

As I mentioned, I think we have a good start. Bill Reilly and I have already met with a number of tribal leaders just in the first few months we have been here. I personally have an affection for these issues, having dealt with them in my capacity and days at the Justice Department. Both Bill Reilly and I appreciate the nature of tribal government and tribal interests and, most importantly, the role of tribes and reservations in our culture and our society.

We have both been moved in these meetings, and I in prior incarnations, with a government philosophy that many of the tribes have, which has been referred to as the seventh-generation criterion for making decisions. There are a number of tribes which make policy decisions based on the impact those decisions will have seven generations on the future. Obviously this is a moving kind of government criterion, and it is also an excellent sign of the environmental commitment that the tribes have.

The context in which we are working, of course, is not an easy one. EPA statutes over the years have been less than clear with regard to their treatment of the role of tribes and the status of tribes, and we have been working with the Congress in dealing with some of the lack of clarity in some of the environmental laws.

And, of course, as we all know, resources are tighter than ever for all programs. But let me describe, in spite of the difficulties, how we are proceeding at the Agency.

Our overall goal is to have our Office of Federal Activities at EPA serve as the coordinator in a process of integrating Indian issues into all EPA programs. We have every program office at the Agency involved in this process of integration.

Bill Reilly's interest in a top-level focus on this integration is evidenced in what I think is the first time an administrator has appointed a special assistant on his personal staff, Mr. Doug Cooper, for dealing with liaison and coordination with regard to Indian environmental issues.

Our testimony goes into some detail on what is going on these days. Let me just talk about some of the significant things that we are doing.

First, we are working hard to remove statutory impediments to the tribes being treated like States and treated as appropriately as governmental authorities for implementing environmental programs.

In the President's proposal on the Clean Air Act we intend to have provisions, like some of the other environmental laws, which will authorize EPA to deal with tribes on a government-to-government basis as we deal with States.

Second, we have been working to include Indian tribes in our program development activities on an institutionalized basis as much as possible. We are also trying, wherever we appropriately can, to bring tribes and States together to deal with environmental protection issues of common interest, and we include these kinds of objectives in our strategic planning process.

Of course, this is a process that is going to take some time, but it has borne some fruit. I think in the State of Washington we have recently had a very good experience with the Colville Tribe. Just yesterday, I believe, the Administrator approved Colville's proposed water quality standards, and those were arrived at in a process which involved the State of Washington in a consultation relationship. I believe the Colville Tribe also received from the State of Washington an environmental excellence award.

So while this is one incident and there is a lot of work to be done, it is a good sign.

Third, we're working with our colleagues here today and with other agencies on closer communication and cooperation among the Federal agencies that can have a role to play in this area.

Fourth, and importantly, we are committed to the process of helping to enable tribes to assume the authority to protect their reservation environments that they want to have and to take these programs on.

Again, it is a difficult task. We have been working for the last 20 years in dealing with 50 States. We have roughly 280 reservations and 222 Alaska Native villages, all of which are important governmental jurisdictions to deal with. That obviously implies that it will take some time to integrate all of these. And they all have individualized issues that need to be addressed. But, again, we are making progress.

An important area of activity is providing technical information, technology transfer, and training. Those kinds of activities are things that need to go forward on an even more aggressive basis than they have in the past. We have developed, with the National Congress of American Indians, a handbook for dealing with environmental issues on reservations. These things are good success stories, and we intend to continue and expand on them.

Technical assistance and training, as I said, are going to be increasingly important, as will pilot programs for dealing with the integration of or the adaptation of environmental programs on specific reservations.

We have had some funding available in the air and pesticides programs and under the Water Act in the past. We do hope and expect that funding for tribes will increase noticeably in the near future in such areas as the Clean Water Act, the Safe Drinking Water Act, and Superfund grant programs as these programs come on line. These increases are going to be notable, but I emphasize the need is far greater than the funds available.

The States have had a long head start on this process of developing these programs and working with the Federal Government to come up to speed. We have work to do with the States. But the tribes have a lot longer way to go to catch up and to come up to speed. We recognize that fact, and we recognize that it is an important issue to address, so we intend to work to do what we can to make additional funding available, and certainly will be aggressive in finding ways to give technical and other assistance to tribes. But, as we all know, there are not easy answers in finding all the funding that we'd like to have.

As part of this process, Bill Reilly and I and the Agency are working on developing environmental priorities so that where we do have money and resources we can target those to where the real environmental needs are, and we're going to pursue that with tribes as being an integral part of that process.

In short, Administrator Reilly and I care a great deal to consult closely with the tribes and with the Congress to develop what I would call a unified integrated strategy for dealing with the future. I think we've done reasonably well in dealing on a program-by-program basis, but that's a very limited process and a very restricted process. We first have to look to make sure we have the statutory authority we need to work directly with tribes.

We're going to continue to promote cooperative efforts among the relevant Federal agencies and, where appropriate, the States and other parts of society. We certainly intend to be tough in working with the tribes and with non-Indians on reservations that have activities that affect reservations.

In the end, as we know—and we've been pleased with the kind of discussions we have had so far—we can only be successful with the full participation of Indian tribal leaders. We are committed to work with those leaders and to support them in this task.

As I said, we intend to make a major push to integrate our efforts in this area, and, as part of that, Bill Reilly and I are designating a task force within the Agency in consultation with the tribes to recommend to the Administrator and me what else the Agency can do to take a truly multi-media approach to reservation environmental issues.

I'll close there, Mr. Chairman. I thank you for the opportunity to be here. I will be delighted to discuss these issues further with you.

Thank you.

[Prepared statement of Mr. Habicht appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Habicht.

I would like to begin by commending you and your agency for recognizing the problem we have before us as it relates to Indian country and to assure you that you will receive the full cooperation of this committee.

Having said that, I still believe that it would be well that we look back, because the past is prologue, and we may learn from our past relations with Indian country.

This committee has been advised that in the past 15 years EPA has spent approximately $42 billion carrying out its responsibilities in the United States. Of that amount, $25 million was spent in Indian country, which is about one-twelfth of 1 percent. I don't think anyone can suggest that that is a fair distribution.

In your prepared statement you have stated that your agency, during fiscal year 1988, spent 77 work years and $6.9 million to assist Indians. I have a few questions.

What is the budget of the EPA? What was it in fiscal year 1988?

Mr. HABICHT. I believe that was about $5.5 billion.

The CHAIRMAN. So of the $5.5 billion you were able to spend $6.9 million for Indians. Of that $6.9 million, how much was transmitted directly into tribal governments, as contrasted to contracts?

Mr. HABICHT. I'm not sure what the breakdown of those numbers are. Some of the larger elements of that were for public water supplies, for 106 planning advances under the Clean Water Act, and, of course, that number doesn't include, I believe—I guess it does include construction grants. A lot of those were for water programs and activities. We can certainly get the breakdown for the committee between direct money and contract money.

The CHAIRMAN. I am not bringing these up to be critical. As I said, it would be well for Indian country to see that this is the way it was and that it is going to change now.

For example, I wish to thank you for the leadership you are taking in proposing amendments to the Clean Air Act when it comes up for reauthorization—amendments which I gather are necessary if we are to delegate enforcement authority to the tribal governments.

My question, sir, is: when can we look over these amendments? I realize this committee does not have principal jurisdiction and responsibility in this area, but we have the responsibility of overseeing the welfare of Indian nations.

Mr. HABICHT. Absolutely, Mr. Chairman. We are in the process of drafting some proposed language for the entire Clean Air Act, and I believe we are well along with the language on that particular issue. We'd be delighted to share it with this committee within the next two weeks, and also with our colleagues in the tribal community, as well, for discussion.

The CHAIRMAN. And have you called upon Indian leaders for input in the drafting of these amendments?

Mr. HABICHT. My understanding is that we have had several discussions and consultations with tribal leaders on the kinds of things that needed to be in those amendments, but we have not involved any people outside of a small group of Federal persons in the actual drafting process.

The CHAIRMAN. Thank you very much.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

I was certainly glad to hear about the formation of the task force that you mentioned in your testimony.

I just have one question. The Colville Tribe of Washington will testify that it has taken 3½ years to get their water quality regulations approved by EPA. They will be on the next panel. Do you believe that there are extra requirements EPA makes of the tribes, especially in terms of getting State agreement than it makes of States, vis-a-vis other States?

Mr. HABICHT. Senator, we just signed the approval of that after a long process. As you mentioned, it took several years.

Part of the concern there was that there was the intervention of the Clean Water Act Amendments of 1987, which addressed some of these issues, and there was some time to be taken to determine whether that should slow down this process or whether we should wait and integrate that into the new program, and we have decided ultimately to go ahead, and we are glad that it is done.

I think that there have been some delays that may have been necessary just because we're all learning this process that we don't expect to see happen again in the future.

Senator McCain. Thank you.

Again, I'd like to express my appreciation of the attitude that you and Mr. Reilly have taken in helping us address these issues. I have some reason for optimism, and I thank you for the degree of cooperation which you have extended thus far.

Thank you.

Mr. Habicht. Thank you, Mr. McCain.

The Chairman. Thank you.

I now call upon Dr. Rhoades, our old friend here.

STATEMENT OF DR. EVERETT R. RHOADES, DIRECTOR, INDIAN HEALTH SERVICE, ROCKVILLE, MD, ACCOMPANIED BY BILL PEARSON, ASSOCIATE DIRECTOR, INDIAN HEALTH SERVICE, OFFICE OF ENVIRONMENTAL HEALTH AND ENGINEERING

Dr. Rhoades. Thank you, Mr. Chairman and Senator McCain.

I'm Dr. Everett Rhoades, the Director of the Indian Health Service. Accompanying me today is Mr. Bill Pearson, who is the Associate Director of the Indian Health Service, Office of Environmental Health and Engineering.

We are happy to be here today to discuss the Indian Health Service's longstanding involvement in the implementation of EPA programs.

I would just make a few summary comments here with the understanding, as you pointed out, that statements submitted will be entered into the record.

I have reiterated the mission of the Indian Health Service before this committee a number of times. Let me just add that an integral part of that overall mission of the Indian Health Service is the requirement and the commitment to promote a healthy environment, including the monitoring and assisting and the resolution of any environmentally-related health hazard.

Efforts that we have undertaken, particularly in the last 30 years since passage of Public Law 86-121, the Indian Sanitation Facilities Act, the number of Indian homes with safe water has gone from approximately 20 percent to 80 percent. We realize that this doesn't mean the job is done yet, but a great deal of progress has been made.

Senator McCain. When was it 20 percent?

Dr. Rhoades. I'm sorry?

Senator McCain. Over what period of time?

Dr. Rhoades. Since 1959—30 years ago, when that act was passed.

The efforts of Indian Health Service have been recently reiterated and endorsed by the United States Congress in the Indian

Health Care amendments of 1988. This Act also provides for the reaffirmation therein of the primary responsibility and the authority of the Indian Health Service to provide necessary sanitation facilities and services to Indian communities.

As I mentioned, for years now the EPA and Indian Health Service have coordinated our activities in Indian communities through a series of formal and informal agreements, and extensive discussion and dialogue at headquarters, as well as at field levels.

The network of professional staff in the Indian Health Service, and through our longstanding policy of Indian self-determination and government-to-government relationship, have enabled the inclusion of Indian people in these discussions of environmental issues.

We have developed and implemented a fairly comprehensive environmental health program for many years focusing primarily on more immediate threats to health—provision of safe water, sewage, and, in more recent years, increasing attention to injury control and the contribution that the environment makes to that.

This program includes surveillance of many of the regulated Federal and tribal environmental health activities and many non-regulated environmental conditions and activities, all of which affect health. Also available is the continuing provision of technical assistance and training to help improve any adverse conditions found.

The programs of both agencies do overlap, but generally that overlap is focused on those Federally regulated environmental activities and conditions on or near Indian reservations which affect health conditions as opposed to economic or other conditions. I would just point out that the Indian Health Service has no enforcement authority, and we do not assume or undertake any regulatory or enforcement duties or responsibilities.

Likewise, we do not perform routine testing or sampling of water and wastewater, that being reserved to being an integral part of the operation and maintenance of sanitation facilities; I believe it is generally agreed that such routine sampling is a tribal responsibility.

Through special surveillance activities from time to time, particularly at the request of tribes, the Indian Health Service will help to identify problems associated with solid waste, hazardous waste, asbestos, radon, and so forth. IHS then makes recommendations for alternate ways to address any of these problems.

The roles of the EPA, the tribes, and Indian Health Service, within the Federal-tribal relationship regarding environmental issues, are constantly being reviewed. This review occurs not only at the local level where environmental concerns arise and where the best solution usually can be identified, but also at the national level.

I have learned a great deal from the statement just preceding this one. I believe that our actions and interactions have been productive to date, and I look forward to working even more closely with EPA and the BIA, the tribes, and also this committee, Mr. Chairman.

[Prepared statement of Dr. Rhoades appears in appendix.]

The CHAIRMAN. All of us have different responsibilities, and I believe that the Indian Health Service has one of the most important responsibilities in looking after the wellbeing, the health, and the sanitation of Indian people in Indian country.

As you say correctly, you do not have enforcement authority. You do not have powers to arrest. But you do have the responsibility of monitoring and conducting occasional surveillance of conditions.

I believe your agency is in the best position to tell this committee as to the quality of health in Indian communities.

How would you rate the environment of Indian country based upon your standards in water?

Dr. RHOADES. In water?

The CHAIRMAN. Yes.

Dr. RHOADES. I cannot provide a number at this moment because the problem is so vast. I believe all of the professional individuals in the Indian Health Service would say not too good and threatened.

The CHAIRMAN. As you know, I spent about a week in Alaska visiting native villages, and I was horrified to see the sewer system, which consists of a pipe leading from the toilet directly into a lake which empties into the river and drinking water comes out of the river. I would assume that responsible officials of our government must have seen that. If I can see that, anyone else can.

And I checked further and I found that many of the people there have hepatitis. Is that the situation we find in many areas?

Dr. RHOADES. When I say it's my impression that that's not the situation we find in many areas, I do not intend to indicate that it is not a very serious problem and that it does not exist in other areas. The problem of hepatitis B, which is the hepatitis that has been most prevalent in southwestern coastal Alaskan communities, is not clearly related to the water supply but is contracted on a more personal basis. However, hepatitis A is clearly a water-borne disease, and it would be expected to occur with increased frequency in the situation which you described. I do not believe that I could say that that's an unusual situation in Alaska.

The CHAIRMAN. When your associates come across situations like that, do you notify your brother agency, the EPA, to do something about it?

Dr. RHOADES. Let me ask Mr. Pearson if he can address that more directly. I don't know that we necessarily would in every instance.

Mr. PEARSON. Mr. Chairman, we do, when we identify health hazards as a result of poor sanitation facilities, notify the appropriate agency, as well as our own staff, that we have a health problem here. That notification usually includes the appropriate tribal organization, the appropriate State organization if their laws are applicable, such as in Alaska, and through one route or another, either immediately or within a short period of time, we end up notifying our counterparts in the Environmental Protection Agency.

We utilize the regulations that the Environmental Protection Agency has promulgated to identify our sanitation facilities construction deficiencies in Indian lands.

The CHAIRMAN. Do you follow this notification to determine whether your recommendations have been implemented?

Mr. PEARSON. We work very closely with the Environmental Protection Agency and the other agencies to follow through on these notifications and to try to identify resources from governmental and non-governmental sources to correct these problems.

The CHAIRMAN. Are you satisfied that your notification has resulted in corrective steps being taken?

Mr. PEARSON. Mr. Chairman, I cannot say we're satisfied at all. We made significant improvements, though. For example, in 1987, for the first time in history, the infant mortality of American Indians and Alaska Natives became better than that of all the races in the United States. In other words, we had less infant mortality among American Indians and Alaska Natives than the U.S. all races. In 1988 we passed another significant milestone——

The CHAIRMAN. For the first 30 days, isn't it?

Mr. PEARSON. That's correct.

The CHAIRMAN. But after that it gets worse than the rest of the Nation.

Mr. PEARSON. You're correct. Although it is the first 30 days that are very critical.

The gastroenteric disease deaths that have been caused among the American Indians and Alaska Natives in 1988, as you recall from previous hearings, also passed a milestone. That incidence of disease deaths became less than the U.S. all races, which means that two of the primary indices that we have for environmentally-related illnesses have taken a very significant turn around.

Now, that's for the Indian population as a whole. We acknowledge, though, and we are concerned about those pockets among the American Indians where we do have unusually high—higher than average—infant mortality.

You have just described some of them in the State of Alaska, which are by far some of our most severe. And we're not satisfied with it. We're still working to improve them.

The CHAIRMAN. One of our concerns involves coordination. I gather that there is some lack of coordination. Are we all working together now to bring about a process or scheme that would improve coordinate?

Dr. RHOADES. Since the microphones are in front of me at the moment, I would say yes. And I think we all acknowledge that we could work more closely together. That is a kind of activity that always needs constant attention. We're certainly prepared to do so.

The CHAIRMAN. I would suggest that it is very important because, of the many letters we receive from Indian country, timely correction of problems is a major concern. I would assume that with the lack of coordination you cannot correct these problems in a timely fashion, so I hope that you can bring this about as soon as you can. We stand ready to assist you in any way possible.

Senator McCain.

Senator McCAIN. Thank you, Mr. Chairman.

Dr. Rhoades or Mr. Pearson, what is your estimated cost for all documented waste and sanitation facilities needs of the Indian tribes?

Mr. **Pearson**. Senator McCain, we have identified unmet needs of approximately $700 million in health-related water supply, sewage disposal, and solid waste deficiencies. That number would be estimated at higher levels from the Environmental Protection Agency, when they get around to completing a total inventory of needs. This is because many of our preliminary cost estimates are based solely upon immediate health needs, and we have not fully compiled our list of cost estimates associated with full compliance with the environmental laws.

Senator **McCain**. How many Indian homes lack plumbing, Mr. Pearson?

Mr. **Pearson**. We've estimated 20 percent of the American Indian and Alaska Native population. That would probably be in the neighborhood of more than 200,000 Indian people, or approximately 40,000 to 50,000 homes. We could provide a better cost estimate for the record for you or a better estimate of the number of homes for you.

Senator **McCain**. Do you have a correction, Dr. Rhoades?

Dr. **Rhoades**. No, we were just having a bit of a discussion on how many have no water supply versus how many have a safe water supply. There are an estimated—I don't have the number immediately in front of me, but we have estimated approximately 10,000 to 15,000 Indian homes that have no water supply. Many of those you have seen in Alaska, Senator Inouye. But we have estimated that 20 percent of the Indian population that may not have a safe water supply and sewage disposal.

Senator **McCain**. Thank you very much.

Thank you, Mr. Chairman.

The **Chairman**. Thank you.

May I now call on Mr. Hayes.

STATEMENT OF PATRICK A. HAYES, ACTING DEPUTY ASSISTANT FOR INDIAN AFFAIRS FOR TRUST AND ECONOMIC DEVELOPMENT, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY GEORGE FARRIS, CHIEF, ENVIRONMENTAL SERVICES STAFF; FRANK KHATTAT, ECOLOGIST, BUREAU OF INDIAN AFFAIRS

Mr. **Hayes**. Mr. Chairman and Senator McCain, thank you for the opportunity to appear at this hearing on the implementation of the Indian policy and programs of the Environmental Protection Agency.

I am accompanied today by Mr. George Farris, who is the Chief of our Environmental Services Staff, and by Mr. Frank Khattat, who is an ecologist with the Bureau of Indian Affairs here in Washington.

The **Chairman**. Please come forward.

Mr. **Hayes**. We also hope these hearings will lead to a better understanding of these situations and a closer cooperation among the Congress, and Indian tribes, and the Federal agencies charged with improving life on the reservations.

Mr. Chairman, you have indicated that the full text of the prepared statement will be entered into the record. I have a summary from that.

In 1984, EPA approached the Bureau and the Department of the Interior with a draft of its proposed Indian policy. EPA at that time was commended on its efforts of assuring that their program became responsible to tribal self government and for complying with the Presidential policy of dealing with tribes on a government-to-government basis.

We provided comments to EPA on their draft statement and, in general, voiced no major concerns with the content of the policy.

The development and the implementation of the EPA Indian policy proved to be very timely. In the years that have followed, many of its laws have been reauthorized to include tribes where they were not previously mentioned. As a result, programs have been established by which tribes may obtain funding to implement their own programs on the reservations.

Much of the Bureau's experience with EPA and the tribes has been in the reauthorization of the Safe Drinking Water Act, the Clean Water Act, and the Comprehensive Environmental Response Compensation and Liability Act as amended, CERCLA.

Numerous meetings among the Bureau, EPA, and the tribes concerning the various issues have been held at both the national and the regional levels.

EPA has been very helpful and instrumental in the preparation of a memorandum of understanding among BIA, EPA, HUD, and the Indian Health Service that will define each agency's role on Indian land and also address areas of mutual concern. That MOU is in draft form and is being circulated amongst the agencies.

In regard to the implementation of the EPA policy, we believe that the Bureau has responsibilities in the areas of water quality, hazardous materials management, radiation, air quality monitoring, pesticide application, and solid waste management.

The Bureau wishes to commend EPA on its policy and efforts thus far; however, as with any undertaking of this size, there will be occasions when adjustments must be made to improve the end result.

The Bureau believes that two basic adjustments can be made which will greatly improve the bottom-line service to the tribes. One improvement is for better notification and involvement to Bureau personnel at the regional and area office levels; and the other is for more clear guidance for tribes on what programs affect Indian lands, whether funding is available and, if so, how these funds may be obtained.

Again, we wish to commend EPA on its Indian policy and program, and only wish that other Federal agencies would follow their lead. The Bureau is more than willing to assist EPA and the tribes in carrying out this policy. It is through this kind of cooperative spirit that we may all work together to ensure such concerns are addressed.

This concludes my summary statement. I will be happy to respond to any questions the committee may have.

Thank you.

[Prepared statement of Mr. Hayes appears in appendix.]

The CHAIRMAN. Mr. Hayes, I gather from a report the committee staff has received from EPA that the estimate of tribal needs to correct some of their environmental concerns would exceed $250 million. At the same time, we have received reports that although many Indian tribes are eligible to borrow money, the pay-back requirements are so burdensome that, for all intents and purposes, even if the authority to make loans is there they can't take advantage of it. Secondly, the number of grants are negligible.

What would you suggest to Indian country as to how they can finance these corrective measures?

Mr. HAYES. Mr. Chairman, as you point out, the cost of remedial environmental concerns is a very expensive proposition. What the Bureau has done in its limited areas has been to attempt to assure that the lessees in a situation post adequate bonding for environmental problems which may arise later on.

I think another possibility might be for the Federal agencies that are involved to come to some agreement and understanding as to the responsibilities for clean-up efforts, and if it turns out that there is a Federal responsibility involved, then that Federal agency should seek appropriate funding. That would be my response.

The CHAIRMAN. This committee has much to do, and yet, because of the lack of data and information, we have not been able to proceed in the appropriate fashion.

Would the three agencies here have any objection if the committee should issue a call to Indian country with the submission of a questionnaire and asking them what, in their opinion, are some of their environmental concerns? The committee will gather this and pass it on to you.

Mr. HAYES. Mr. Chairman, I cannot speak for the other agencies, but for the Bureau of Indian Affairs I would encourage that. Part and parcel of that, I think some time back, approximately 1 year ago, there was a report that was submitted to the Congress and other calls for identification information have been previously sent.

But I would say that if it came from this committee that it would carry a great deal of weight, sir.

The CHAIRMAN. It is unfortunate, because under ordinary circumstances Congressional committees could call upon agencies and ask them for statistics of this nature. And since, either out of the lack of funds or lack of initiative, we have not been able to get this information, I have instructed my staff to begin working, and I hope that we can work with you, sir, to set up a proper questionnaire on environmental concerns and health standards which we will forward to all leaders of Indian country. And when we receive the report, we will furnish you everything we have.

Mr. HABICHT. Mr. Chairman, if I might just speak on behalf of EPA, I concur that it would be very helpful. It is consistent with the process that we have been working on or embarking on to really get a sense for the magnitude of the problems and put a plan together for addressing them. We'd certainly be delighted to make our staff available to work with your staff in that process.

The CHAIRMAN. I appreciate this, because I am certain that when a report is made based upon the data that we gather, the outcome will be so horrendous that we would not be able to just sit by and carry on business as usual. Because what I have seen would convince me that something is terribly wrong.

I thank you very much.

Senator McCain.

Senator McCain. Thank you, Mr. Chairman.

Mr. Hayes, I would like for you to perhaps give a more complete answer to the Chairman's question to you about how the tribes are going to find ways to come up with this funding. Perhaps you can provide it for the record.

Mr. Hayes. I'd be happy to.

Senator McCain. I think that maybe you can provide them with some more options than those that you described. Perhaps after you think about it we can come up with some more ideas as to how we could provide them with that capability.

Mr. Hayes, you do agree that what we're talking about here, land and water, constitutes the most important tribal trust assets? Would you agree with that?

Mr. Hayes. Yes, sir.

Senator McCain. How much funding has the BIA requested for environmental protection on Indian lands in fiscal year 1990?

Mr. Hayes. In fiscal year 1990, Senator McCain, we have requested $766,000.

Senator McCain. That's $766,000?

Mr. Hayes. Yes, sir.

Senator McCain. Roughly how many personnel does BIA employ who have responsibilities for environmental quality or regulation?

Mr. Hayes. Approximately 20, Senator.

Senator McCain. Has BIA taken steps to improve the capabilities of tribal governments to regulate reservation environments?

Mr. Hayes. Yes, sir; I would say that we are, in coordination and consultation with the Environmental Protection Agency. We participate in training and workshop opportunities along with EPA and other affected Federal agencies. Yes, sir.

Senator McCain. I'm sure that you know that we understand that the task, particularly that EPA is required to perform, is fraught with controversy and dissatisfaction, as often displayed by the people who fall under their supervision. I would suggest, Mr. Chairman, if we had a group of mayors and city councils as a panel here you'd probably hear a lot of the same frustrations vented that we will hear from the tribes about EPA regulations and lack of funding. This has been an ongoing situation ever since EPA became a government entity.

At the same time, I think that perhaps some of the problems in regard to the Indian reservations are more severe in many respects due to a number of factors, including neglect, including lack of funding, including lack of coordination, including lack of expertise from some of the agencies in dealing with the unique relationship that the Federal Government and tribal governments and State governments have.

So I hope we can turn this around. Mr. Hayes, I hope you will request a substantial amount of more money next year so that we can approach some modicum of funding for this effort.

Thank you all.

Thank you, Mr. Chairman.

The Chairman. Thank you very much.

We will be submitting, if we may, several questions of a technical nature that I hope that you can respond to.

[Questions and answers thereto appear in appendix.]

The CHAIRMAN. I have one I would like to place in the record publicly. The Pueblo Zuni, New Mexico, has advised this committee of its attempt to get a certificate of emergency for its domestic water system, and I have several questions relating to that. Without objection, documents from the Zuni Pueblo will be made a part of the record at this time.

[Documents from the Zuni Pueblo appear in appendix.]

The CHAIRMAN. The tribes of the Fort Peck Indian Reservation in Montana have advised the committee of problems involving inter-agency management of oil and gas development on their reservation. If I may, I would like to submit questions, because apparently this has lead to surface and ground water problems on the reservation.

Here, again, I would like to insert at the appropriate place a letter that we have received from Fort Peck.

[Fort Peck letter appears in appendix.]

The CHAIRMAN. I hope that we can look at these, because apparently these are emergency matters—something that would have to be done before the 4th of July.

Gentlemen, I thank you very much.

Mr. HAYES. Thank you.

The CHAIRMAN. Our next panel consists of: The chairman of the Wind River Environmental Quality Commission of Wyoming, Mr. Wes Martel; the chairman of the Law & Justice Committee of Colville Confederated Tribes of Washington, Mr. Dale Kohler; and the director of the Water Research Laboratory of the Minnesota Chippewa Tribe of Minnesota, Mr. John Persell. I have just been advised that Mr. Martel is not here.

Gentlemen, I thank you for your participation this afternoon.

May I first call upon Mr. Kohler.

STATEMENT OF DALE KOHLER, CHAIRMAN, LAW AND JUSTICE COMMITTEE, COLVILLE CONFEDERATED TRIBES, NESPELEM, WA, ACCOMPANIED BY GARY PASSMORE, DIRECTOR, COLVILLE TRIBAL ENVIRONMENTAL TRUST DEPARTMENT; BRUCE DIDESCH, LEGAL COUNSEL, COLVILLE ENVIRONMENTAL QUALITY COMMISSION

Mr. KOHLER. Mr. Chairman and members of the committee, my name is Dale Kohler. I'm here as a representative and chairman of the Law & Justice Committee of the Colville Business Council of the Confederated Tribes of the Colville Reservation.

I am accompanied here today by the director of our Colville Tribal Environmental Trust Department, Gary Passmore; and legal counsel for our Colville Environmental Quality Commission, Bruce Didesch.

The CHAIRMAN. Please have them come forward. You have travelled long distances, and you might as well take the special seats.

Mr. KOHLER. I'm also a vice chairman of the Colville Environmental Quality Commission, which was established in 1985 to coordinate the development of the tribes' environmental programs and operate as the administrative appellate body of the Colville Water Quality Management Program.

On behalf of the Colville Tribes I would like to take this opportunity to thank the committee for its invitation to present testimony at this oversight hearing on the implementation of EPA's Indian policy and environmental programs on Indian lands.

The Confederated Tribes of the Colville Reservation is composed of 11 bands consolidated on one reservation in 1872. It has about 7,500 members, and is governed by the 14-member Colville Business Council.

The Colville Tribes have been involved with EPA for 9 years on several environmental media programs, including water, air, and hazardous waste, and have developed comprehensive environmental regulatory programs for the 1.4 million acre Colville Indian Reservation in north central Washington State.

In 1985, the Colville Tribes adopted a water quality management program developed under section 208 of the Clean Water Act.

Tribal environmental policy is established by the Colville Environmental Quality Commission, composed of four members of the Colville Business Council and five professional staff members. Current tribal environmental programs are administered by the tribes' Environmental Trust Department. These include water quality monitoring and planning activities, non-point source enforcement programs for forest practices, mining, and on-site wastewater in coordinating the underground injection and underground storage tanks program with the EPA.

The tribe has taken the lead role in water quality monitoring and planning activities for Franklin Delano Roosevelt Lake, which is Washington State's largest lake. This is a cooperative effort involving the State of Washington, three Federal agencies, and several counties.

The department's Environmental Health Division coordinates the Safe Drinking Water Act and Hazardous Waste—RCRA and SARA activities—with EPA, State, and local governments.

In addition, the Tribes' Fish and Wildlife Department is involved in the Washington State Timber, Fish, and Wildlife Non-point Source Control Force Practices' fisheries enhancement program off reservation.

The Colville Tribes' environmental programs are funded by a combination of the tribal, BIA, and IHS funds, with supplements from special project grants such as State 205 Federal money. The Tribe is not now slated to receive any money from EPA for fiscal year 1990 or fiscal year 1991.

Colville Tribes has, through firsthand experience, gained insight over the years into some of the problems EPA has in dealing with tribes. We have met repeatedly over the years with Agency personnel at both headquarters and regional levels and have made these problems known. We have spent tens of thousands of dollars developing comments on EPA's policies and regulations.

Unless EPA is directed by Congress and the President to do something about helping Indian tribes dealing with their environmental problems, EPA's Indian policy will fail and Indians will continue to be treated as second-class citizens with respect to environmental quality. This is the reason we feel compelled to submit this testimony to this committee.

The Colville Tribes believes three major reasons exist for EPA's lack of progress on implementing its Indian policy and reservation programs. First, the amount of staff, time, and money dedicated to the operation of Federal programs in Indian country and assistance to tribes to enable them to develop their own delegable programs is woefully inadequate.

Second, the Agency suffers from institutional inflexibility and bias that stifles creative and responsive solutions necessary to overcome some of the barriers to implementing a workable environmental regulatory program in Indian country.

Finally, because the Federal role and the State-Federal partnership under the various Federal environmental laws is largely one of technical support and administrative oversight, the Agency usually delegates operational responsibility to the State and is, therefore, ill equipped to actually operate many regulatory programs.

After developing each of these points in greater detail, I would like to share with the committee some specific case studies from Colville which I believe will underscore the problems EPA is experiencing.

The need for increased funding and staffing. On January 19, 1989, EPA submitted its report to Congress required by the Water Quality Act of 1987 on Indian Wastewater Treatment Needs and Assistance. The report is indicative of the massive failure of the system to effectively address environmental protection in Indian County in all environmental media.

The report indicates that while $48 billion dollars has been expended by the Federal Government and awarded to municipalities to support construction of wastewater treatment facilities under title II of the Clean Water Act since 1972, only $25 million, approximately ½ of 1 percent, was awarded to Indian tribes.

The report then goes on to discuss the current treatment needs in Indian country in order to avoid environmental health risks and comply with the water quality goals of the Clean Water Act.

The $470 million expected to be needed far outdistances the $30 million available to tribes through 1990. Although these figures represent just one small component of environmental challenges facing tribes today, its lessons apply uniformly to all environmental media and it underscores the failure of the Federal-State partnership to adequately protect the reservation environment.

The current funding structure and staff devoted toward Indian program development and regulation is virtually nonexistent. To date, the Agency has committed no more than minimal staff and funds toward implementation either of its Indian policy or its Congressional mandate on Indian lands. Most regions only have one Indian staff person—an Indian coordinator—and many of those are not even full time.

The EPA currently plans to place an Indian liaison person within the respective State operations offices.

A further complicating staff problem is that no enforcement personnel or program people are assigned specifically to reservation issues, even though EPA retains jurisdiction over Indian country for those regulatory programs it delegates to the States.

Since EPA is ill-equipped to assume the regulatory role in Indian country and the State lacks the authority to do so, tribal infrastructures need to be developed in order for tribes to assume that responsibility. Therefore, a huge infusion of money on the scale similar to what the States have received over the years is needed. It will not help, however, to simply build up tribal infrastructure without a corresponding improvement in EPA staff and funding levels.

Without such a financial and personal commitment, EPA's Indian policy will be little more than what it has been to date, an inspirational program on paper with little practical substance in Indian country, itself.

EPA's institutional inflexibility and bias. When EPA initiated its Indian policy in 1984, it hoped to put programs in place on the most critical reservations within 5 years. Unfortunately, other than the initial pilot projects, EPA has been unable to make any significant strides in the implementation of its Indian policy. A significant reason is EPA's inability to restructure itself to adapt to the changing dynamic of working with three sovereigns as called for by its Indian policy. EPA's historical relationship at the regional and State office levels has been a bilateral one.

Since most of EPA's program responsibility is delegated to the respective States, it focuses more on monitoring and oversight of those programs than actual on-the-ground program development or enforcement.

When the Agency does act, most program staff are unaware of the Indian policy and what a government-to-government relationship means.

Two years ago the Colville Tribes had an instance which underscores this lack of knowledge. EPA responded to a private investigation request regarding possible cyanide leaching from an abandoned mine on the reservation and did some soil and water monitoring sampling.

The program people did not notify the Colville Tribes of their activity and were not even aware that they were operating on a reservation. When a letter was written to the staff person in charge of the sampling asking that the report be submitted to the Colville Tribes as the responsible government, the letter was ignored. When asked why, the staff responded by saying that they always report to the State of Washington because the State has program responsibility. The Tribes still has not received the information requested, despite several subsequent efforts.

Another example is the continued endorsement by the Washington operations office of State RCRA inspections and monitoring on Indian lands in spite of EPA's position and the court's determination in *State of Washington* v. *EPA*.

More recently, the Colville Tribe has attempted to discuss general enforcement and response coordination for the reservation with the head compliance officer of Region 10 using a possible illegal dumping of asbestos waste on the reservation as a case study. The Tribes was informed that the individual did not deal with such issues and referred the tribes to the Washington Operations Office. The person indicated that he only dealt with 12th floor issues, which is where the regional administrator's office is located. Except perhaps at the highest levels of EPA, the agency staff have not yet grasped the meaning of government-to-government relationship.

These are by no means isolated instances. Colville Tribes has spent literally thousands of dollars over the past 5 years sending council members and staff to meetings with various EPA program leaders and staff in order to get them comfortable with and familiarize them with Indian issues and the Agency's own Indian policy.

A further institutional problem with EPA is its highly compartmentalized structure, which does not lend itself readily to cross-media program development. Indian tribes do not have the funds, staff, or inclination to mimic State or Federal environmental organizational structures, yet EPA appears unwilling—perhaps unable—to explore alternate methods such as developing cross-media strategies for Indian programs.

Because such strategies have never been developed and are so new, the Agency is reluctant to explore such creative solutions to program development constraints that are unique to Indian tribal governments and environmental problems in Indian country.

Colville Tribes believes that EPA is unable to solve this institutional immobility alone and that some kind of impetus from this committee and Congress is necessary. The Colville Tribes asks the committee to give specific direction to EPA to force it to institutionalize its Indian policy and to make its Indian programs an effective part of the overall environmental regulatory system nationwide.

Requiring Indian operation offices at the administrator and regional levels, upgrading key Indian staff positions, and developing a program and enforcement presence independent of the State action of Indian reservations would be a significant first step and a welcome boost to tribal effort to establish a broad-based environmental regulatory program in Indian country.

I have included in my written comments our experience with water quality standards promulgation and NPDES permits on the Colville Indian Reservation. In both instances, EPA proved either unable or unwilling to move at anything but a glacial pace to solve rather simple problems.

The tribes has also commented rather extensively on EPA draft regulations. We have a particular problem with the EPA draft regulations to implement section 518(c) of the Clean Water Act, which deals with water quality standards conflict resolution.

The Colville Indian Reservation is bordered on three sides by boundary waters. We feel that EPA has misread the law to coerce tribes into adopting State standards for boundary waters and by essentially giving States veto power over tribal water quality standards. This is a needless hurdle for tribes to overcome in view of the fact that adjacent States have been adopting different water quality standards for years.

EPA should only involve itself if unreasonable consequences arise, as described clearly in section 518(c). As an example, the Colville Tribes in the State of Washington worked out potential problems arising out of conflicting water quality standards without any substantial EPA involvement.

I thank you, Mr. Chairman and members of the committee, for being permitted to testify. The Colville Tribes will assist in any way possible. We stand ready to answer any questions that you might have.

[Prepared statement of Mr. Kohler appears in appendix.]

The **Chairman**. There is no question that there is ample justification to be critical of EPA and BIA and IHS on matters of environmental quality, but I think there is enough blame to go around to include the Congress of the United States and also this committee.

This is not stated as a justification or an excuse but, as you may know, this committee does not have jurisdiction over EPA matters. But since we do have responsibilities involving Native Americans in Indian country we decided that we would, with the knowledge of the primary committee, look into these problems.

I can assure you that from now on it will become a routine part of this committee to conduct oversight over the environmental quality issues that are now confronted by Indian country. Obviously, the committee that has prime responsibility has had other problems to contend with, and there were no members who were primarily concerned about Indian matters. This committee will now attempt to fill that gap. I hope that with this arrangement matters will begin to improve.

Mr. Persell.

STATEMENT OF JOHN PERSELL, DIRECTOR, WATER RESEARCH LABORATORY, MINNESOTA CHIPPEWA TRIBE, CASS LAKE, MN

Mr. **Persell**. Mr. Chairman, the written testimony I have was prepared by our president, Darrell Wadena, to read. I would like to read it into the record if I may.

The **Chairman**. Your statement will be made part of the record, like all other statements here. You may summarize if you wish to do so.

Mr. **Persell**. Thank you.

I have come here today to present to you my views regarding the implementation of the Indian policy and programs of the United States Environmental Protection Agency.

I would like to begin by relating to you what it means for my tribe to undertake a formal relationship with the EPA to protect tribal environmental quality.

The Chippewa waters, land, and air are invaluable. These resources represent the basis for our cultural and economic survival. For that reason, our ability to protect our resources may be equated with our ability to self-determine our future. I know from my communication with other tribes across the United States that this is true for them, as well.

The Minnesota Chippewa has had both good and not so good relations with the EPA over the last several years. I do not believe that the EPA staff has fully grasped the history of the tribal/Federal relationship, as may be expected since the Agency was only formed 20 years ago. There have been times when respect for tribal government appeared to be lacking within the EPA. I believe this was the result of a lack of understanding, and I welcome the opportunity for my government to work with this agency of the United States Government.

In 1984, the EPA wrote a very positive and eloquent Indian policy. This was followed by amendments to the Safe Drinking Water Act and the Clean Water Act, both of which contained good Indian self-determination language.

Through these amended laws, the U.S. Government reaffirmed tribal jurisdiction over waters within their reservations. Needless to say, some State governments were not overjoyed with the idea of competing with tribes for a limited amount of EPA funding. The EPA seemed overwhelmed with the prospect of treating some 270 Federally-recognized Indian tribes as States. Consequently, in the more than 2 years following enactment of these Federal environmental laws, little progress has been made toward tribal environmental program development.

Tribes are being asked by the EPA to cooperate with States in the implementation of these Federal environmental protection laws. I believe tribal governments are willing to cooperate with State governments; however, I maintain that in order to cooperate, tribes must first operate Federally-mandated environmental protection programs on par with the States.

Toward this goal, the Minnesota Chippewa Tribe supports the proposed fiscal year 1990 appropriations report language to implement the EPA American Indian policy, which was recently presented to the Appropriations Subcommittee.

I respectfully request that this committee support this funding proposal. A copy of this proposal is included with the written testimony.

Tribes need financial help to establish and maintain their environmental protection programs, as was afforded to States over the past 20 years.

Any EPA funding that is appropriated for tribes needs to be disbursed from Washington in a manner that equitably addresses the needs in Indian country. Items which must be factored into any disbursement formula include reservation size, population, and water resources.

Some EPA programs, such as sewage treatment construction grants, are directly related to population. The needs in other program areas depends on how many acres of lakes and miles of streams a tribe has to protect, and their industrial base.

The EPA needs to involve the tribes in the development of a funding formula that addresses these needs. Funding from other Federal sources——

The CHAIRMAN. Mr. Persell?

Mr. PERSELL. Yes, sir?

The CHAIRMAN. I have just been notified that there is a vote pending at this time, so if I may I would like to recess the committee for about five minutes.

Mr. PERSELL. Yes, sir.

The CHAIRMAN. I will be right back.

[Recess.]

The CHAIRMAN. Mr. Persell, please proceed, sir. I believe you are on your third page, first paragraph.

Mr. PERSELL. Yes, sir.

Mr. Chairman, I would like to, if I may, dispense with reading the rest of the statement and point out what I think are the several highlights.

I think the most pressing item for EPA at this time, at least from our perspective, is for program development at the tribal level within the tribal government. We are asking that the Environmental Protection Agency be flexible in working with the tribes. As our programs are not going to be as large, in many cases, as are State government programs, we are going to need to have personnel cross-trained to deal with solid waste, hazardous waste, underground storage tanks—in other words, one person is going to be doing more than one job and under more than one law the EPA administers. So we are going to need some flexibility.

We would like EPA to consider that all of the human activities that impact water and water quality—we consider under one phase of our law. If they impact water, we look at them as a water-related activity; therefore, we would like to look to a specific section—106—of the Clean Water Act as a starting point for our tribal environmental programs.

[Prepared statement of Darrell Wadena appears in appendix.]

The CHAIRMAN. In your relationships with other tribes, both of you, do you find that the conditions you have described to us are the usual?

Mr. KOHLER. No, sir; I would not characterize what we have expressed as unusual problems in Indian country.

The CHAIRMAN. So you think your situation is better or worse than other parts of Indian country? I would like to have a picture of what we are dealing with here. Do you have any idea?

Mr. KOHLER. Mr. Chairman, if I might respond?

The CHAIRMAN. Yes, please.

Mr. KOHLER. Our situation is probably somewhat better in that we have been involved in environmental matters since 1978 on the Colville Indian Reservation. We have organized our environmental departments so that we can respond to concerns on the reservation. For that reason, I think we probably are in a bit better position.

As you noted in some of the written material, we were part of the pilot project, so the problems that we refer to, if we have those kinds of problems, given our involvement, then you can deduce from that the very difficult circumstances other Indian tribes in the United States are experiencing.

The CHAIRMAN. Well, we will be sending to both of you, as we will to all of the other reservations, our questionnaire, and I hope you can assist us in this.

Mr. KOHLER. We will be most happy to do that, Mr. Chairman.

The CHAIRMAN. We would like to know what we are dealing with. And I must tell you that, as indicated, this is the first time that any Congressional committee has held a hearing in this area, so we are entering into unchartered waters and we want you to help us on this.

But before I say thank you, I would like to acknowledge the presence of Mr. Kohler here, to commend him and thank him for his presence here.

Mr. Kohler, I am aware that you fell last Wednesday and fractured two ribs. Most witnesses, if they fractured a rib, wouldn't be sitting there. We admire your commitment and your dedication to your work.

Mr. Kohler. Thank you, Mr. Chairman.

The Chairman. We stand ready to work with you, sir.

Thank you very much, Mr. Persell.

Mr. Persell. Thank you, sir.

The Chairman. And thank you, Mr. Kohler.

Our next panel of witnesses: the Executive Director of the Council of Energy Resource Tribes of Denver, Mr. A. David Lester; the Executive Director of the National Congress of American Indians, Ms. Suzan Shown Harjo; and the First Vice President of the Inter-Tribal Council of Arizona of Phoenix, Arizona, Ms. Nora Garcia.

Mr. Lester, please proceed.

STATEMENT OF A. DAVID LESTER, EXECUTIVE DIRECTOR, COUNCIL OF ENERGY RESOURCE TRIBES, DENVER, CO

Mr. Lester. Thank you very much, Mr. Chairman.

On behalf of the 43 tribes of the Council of Energy Resource Tribes we commend you and your colleagues on the committee for taking the leadership in holding these oversight hearings.

The tribes of CERT have directed us, since our creation in 1975, to place a high priority in providing technical, scientific, and professional support to their priority environmental concerns. In the early years, our focus was on abandoned mine lands and other environmental problems that resulted from energy and mineral development on Indian lands. That work led us to begin to see significant problems in groundwater and surface water that related to other activities.

We have conducted a number of projects and surveys in an attempt to gain some understanding of the scope and significance of environmental problems as they exist on Indian lands.

We find that the common wisdom in the early days was that Indian country was largely unspoiled due to a low level of development. However, as we began to uncover the real facts we began to see significant deterioration.

We began working with Indian tribes, and since the time of our founding in 1975 we have performed over 250 projects for over 120 Indian tribes throughout the continental United States.

Early on we advocated the establishment of an EPA Indian policy that would respect the integrity of tribal self-government and bring Indian lands into the network of environmental protection in the regulatory and statutory schemes.

The Chairman. Mr. Lester?

Mr. Lester. Yes.

The Chairman. I have been advised by the leadership that we will be having votes almost every 20 minutes or so, and I cannot just sit here and let the votes go by.

Mr. Lester. Yes, sir.

The Chairman. Although our rules permit me to do this, I have never authorized staff to take testimony. If you don't mind, because of the unusual circumstances of this day, would you mind if I call upon the minority counsel, Mr. Eberhard, to take testimony? He has made this his specialty—the EPA. I will try to get back.

Mr. **Lester**. Thank you.

Mr. **Eberhard**. You may continue, Mr. Lester.

Mr. **Lester**. Thank you, Mr. Chairman, Your Honor.

Because of the shortness of time, we have a written statement for the record. We would like to summarize with some recommendations that we'd like to have in the record, Mr. Chairman, and we would hope that your committee could assist us in following through.

We believe that there are three basic priorities to implement the EPA policy, and while these priorities do not necessarily just lie on the doorstep of EPA, but rather for the Bureau of Indian Affairs, the Indian Health Service, as well a number of other federal agencies that have collateral responsibilities for the environment.

First and foremost, we need to do the survey inventory and characterization of tribal environmental resources with the integrity that is required if they are to be accepted by tribes. To date, that has not occurred. The reports that have been filed with Congress lack the integrity to inspire confidence of the Indian tribes. We comment on that in some detail in our written statement.

Second, there needs to be a commitment to invest in tribal institutional capability to carry out tribal governmental responsibilities. This investment was done in the early days as EPA invested in State institutional and personnel capability thru education and training. This has largely been phased out at EPA. Unfortunately, the tribes are moving forward in an era in which that kind of commitment is no longer a part of the EPA program, but for tribes it needs to be re-instituted.

With respect to institutional and human capability, however, we feel the BIA, with their vast education resources and responsibility to assist tribal government, in general, to carry out their responsibilities, should share in making those needed investments.

The third is the provision of program support in both money and technical assistance to allow for sound tribal planning and program operation.

Finally, we would ask that the Select Committee go out to Indian country and conduct field hearings in sites that are more accessible to Indian tribes to bring a broader sense of what the issues are in Indian country, and that it would perhaps also provide an opportunity for the principals and staff of the committee to see first-hand the concerns and the issues that the Indian tribes have, including problems with abandoned mines and waste transportation and storage issues that go far beyond the EPA statutory responsibilities and touch on a large number of federal departments.

We would hope after the field hearings, that at an appropriate time another oversight hearing here in Washington would be conducted to bring the agencies back to report on the progress that they have made since they reported to the committee today.

Finally, I would like to introduce into the record a couple of newspaper articles and an editorial about the fishing issues in Wisconsin, and a thoughtful letter by a non-Indian to the editors of the "Shawano Evening Ledger". These make a complelling case that often environmental issues underlie political and economic conflicts between Indian tribes and our non-Indian neighbors.

We appreciate the time that you have given us, and would be happy to answer any questions that you may have.

[Prepared statement of Mr. Lester appears in appendix.]

Mr. EBERHARD. Thank you, Mr. Lester.

I think before we go to questions we will proceed with Ms. Harjo from NCAI and Ms. Garcia from ITCA.

Ms. Harjo.

STATEMENT OF SUZAN SHOWN HARJO, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC ACCOMPANIED BY GAIL CHEHAK, NATURAL RESOURCES COORDINATOR, NATIONAL CONGRESS OF AMERICAN INDIANS

Ms. HARJO. Thank you.

We have a prepared statement which we would like to submit for the record, and I'd like to introduce Ms. Gail Chehak who is with me today. She is a Klamath and our NCAI natural resources coordinator.

NCAI enjoys very good and positive relations with the Environmental Protection Agency, and we look on this new Administration as beginning a new day in EPA. They have embraced the 1984 Indian policy statement and vowed to make its promise a reality. This is great news for all of us, for we know the proof of the policy is in the action and that direct and immediate actions need to be taken in Indian country to deal with the emergency situations and to prevent them from occurring in the future.

We look forward to substantive change and help for those tribes that have been waging a very lonely battle against the excesses of Western civilization and the continuing State challenges to tribal authorities.

EPA has a 20-year habit of serving the States exclusively, and old habits die hard. On the part of the States and EPA, this will be the case. Tribes have a lot of catching up to do, and we look forward to being part of the process to help tribes in that effort.

We think that inter-agency coordination is absolutely essential to allocate resources and to carve up the jobs that need to be done to assist Indians to clean up the waste of the non-Indians and to protect our environments for our future generations.

We have a few problems with the way the EPA programs have interpreted the 1984 policy for those who have attempted to implement it, and those problems are primarily with regard to serving States if not exclusively now, then first. What we need to see within EPA is a re-prioritization and a reallocation of funds, increased funding from Congress specifically for Indian tribes, but then a re-ordering of funding within EPA for tribes to get at least their fair share.

Part of this catching up is not just in being nice and respectful to the Indian tribes, although that is a wonderful thing to have happen and we welcome it and we see that in the new administrator and the deputy and the program managers and the Office of Federal Activities, and that is a very important thing. It has to be backed up, though, by specific training, technical assistance, turning over of technology.

Congress can help. This committee can help within the context of the upcoming appropriation by asking for specific language in the appropriation, along with—we presume and hope—increased funding that would direct EPA, even if it is only for the life of that one appropriation, to consider Indian tribes as included unless they are specifically excluded from EPA programs statutorily.

If that doesn't work, and if there is an effort to continue down this road of piecemeal inclusion of tribes—which I think is a direction we have all embarked on wrongly—then I think we ought to switch from piecemeal inclusion to something that would be very simple—perhaps in an amendment to the act establishing EPA to have something very simply say "and tribes are included." Because what has happened now is that, unless tribes have been statutorily included, they are assumed to have been excluded.

We are also seeing "definitional" exclusions—particularly with regard to tribes in Oklahoma and in Alaska and in Maine, although few have recognized that the latter is the case.

One example of this is in the Clean Air Act Amendments, where private attorneys in Indian country who represent the specific interests of reservation-based Indians have been relied on as if they represented Indian country generally and were not simply hired guns in their discussion. They have said there is no problem with the definition that says "exterior boundaries of reservations."

Well, of course, that's a huge problem, because as this body knows well, Congress uses terminology like fads. In 1980, when the Maine Indian Land Claims Settlement Act was going through, it was the fad not to call Indian country "reservations." It was a fad in Oklahoma not to call the Indian tribes' territory in Oklahoma "reservations." Several tribes, however, do have reservations in Oklahoma, so even a reservation-based definition would include some tribes in Oklahoma and exclude others.

We just recommend the more inclusive term "Indian country," and either a geographical term that also recognizes use rights off reservation or outside of Indian country, such as "fishing and hunting areas," "gathering," "medicine field areas," or a definition of "tribe" or "Indian nation" that would be inclusive.

Perhaps this can be done through an exchange of correspondence with the committee. Perhaps this is the kind of thing that should also be included as explanatory language to an appropriations bill. But we urge you to think about this problem, and we would be happy to work with you on this, and for us to do something quickly before we begin setting too many regulatory and administrative precedents within EPA and have our excellent relations fall off the track.

We don't have time to try to leave interpretation of Congressional policy up to the imagination of any particular agency or to leave the coordination amongst the agencies or their participation and dialogue with Indian tribes up to the agencies themselves. Congress does need to provide guidance here and to say, "Please understand that this is the Congressional trend."

As I said, we have a prepared statement which we are submitting for the record. We look forward to working with the committee and applaud the committee for having brought these issues out in a way that no other committee can that now exists in Congress.

Thank you.

[Prepared statement of Ms. Harjo appears in appendix.]

Mr. **Eberhard**. Thank you, Ms. Harjo. All of the witnesses' prepared statements will, of course, be made a part of the record. Thank you for your thoughtful comments on short-term solutions to what seem to be otherwise long-term and very, very complicated problems.

I want to come back after we hear from Ms. Garcia to ask some questions about some additional alternative approaches that have been discussed among committee staff and, to some extent, among the members of the committee, to see if there aren't some ways that we can try to improve the implementation process and expedite it a bit without increasing overall the cost to tribal and Federal governments, at least in the foreseeable future.

Ms. Garcia.

STATEMENT OF NORA GARCIA, FIRST VICE PRESIDENT, INTER-TRIBAL COUNCIL OF ARIZONA, INC., PHOENIX, AZ

Ms. **Garcia**. Thank you.

I would say, Mr. Chairman, that we thank you for having the opportunity to be here today to present testimony to this committee on the Environmental Protection Agency's implementation of the Indian policy and agency programs.

The 19 tribes of the Inter-Tribal Council of Arizona consider the quality of our environment to be of paramount importance. Preserving and restoring the environment is fundamental to tribal community and economic development, as well as the health of community members.

It is well known that improvements in delivering drinking water, treating wastewater, and managing waste, resulted in much of the improvement in the health of Indian people over the last century. In addition, the Indian peoples in Arizona have a strong historical, cultural, and religious relationship with our lands and our water.

ITCA has worked with EPA and tribes throughout the 1980s in developing environmental regulatory programs and providing information to tribal leadership and staff. ITCA has participated in the statutory and regulatory development process by attending meetings, submitting comments on draft documents, and maintaining regular contacts with EPA Headquarters and regional staff. Through a contract with EPA Region Nine, ITCA has provided administrative and technical assistance to tribes in Arizona in developing and administering pesticide regulatory programs since 1981.

Tribes in Arizona felt considerable hope with the passage of the Safe Drinking Water Act, the Clean Water Act, and the Superfund Amendments and Reauthorization Act amendments that the barriers preventing tribes from participating in the Nation's major efforts to deal with environmental problems would be removed.

Unfortunately, the initial optimism was soon dissipated by the discussions and documents that EPA generated to implement these amendments. Furthermore, the Agency's continued insistence on specific statutory language for tribal eligibility still leaves tribes without direct access to essentially all hazardous and solid waste management programs under the Resource Conservation and Recovery Act.

Many of the problems discussed in this testimony would have been obviated if the Agency had simply followed its Indian policy and included tribes as eligible participants in its programs. Instead, States have had years to develop programs to protect the environment, while tribes have been left out. This lack of participation is especially critical because the largest funding to environmental programs occurred during the time when EPA did not include tribes in its programs. Now tribes are being expected to develop programs and regulations based, in many cases, on small set-asides of what are State "maintenance" programs, not percentages of the larger funds provided to the States to develop their programs over many years.

When States developed their programs in the 1970's, EPA provided the necessary resources for consultation in developing programs. EPA's legal and program staff met on site with State personnel to develop program plans and prepare proposals. Tribes have received minimal assistance from EPA to this point, and the regulatory process is more burdensome and inconsistent than it was for States.

We have experienced a number of the same difficulties that Suzan and Dave Lester and the prior chairman's testimony had conveyed to this committee. We would like to reiterate that the tribe needs to be treated on a government-to-government relationship.

The funding net is so minute that there is not enough to meet the needs that were not adequately displayed to this committee by IHS, BIA, and EPA. There is an unknown out there on the reservations that has to be met.

The tribes, with what little resources they do have—which are a large amount of land and water bases of the tribes—are essential to their future and their development.

We commend the committee for its perseverance in looking into these matters. It is essential to the tribes and the government and to these people that are out there living under the conditions as were displayed earlier that we, as a whole and not piecemeal, need to approach the solution to the problem that is so prevalent on Indian reservations.

Thank you.

[Prepared statement of Ms. Garcia appears in appendix.]

Mr. **Eberhard**. Thank you.

I would like to ask all of the witnesses, not only on this panel but all of the witnesses that have appeared today, to submit to the committee within the next 30 days any suggestions you have for a survey instrument the committee will be developing and submitting to all of the tribes, as the chairman directed earlier in the hearing.

Mr. **Eberhard**. Ms. Harjo raised a number of possible ways to try to expedite solutions to some of the problems that tribes are experiencing and some of the frustrations that I think both tribes and the Federal agencies are experiencing in implementing these programs.

I'd like to raise with the entire panel the question of whether Congress should consider an amendment to Public Law 93-638 that would broaden it and make it applicable to contracting of regulatory programs now administered by the Environmental Protection Agency.

Ms. HARJO. When 638 was first being considered, and then when hearings were held on the promulgation of rules to implement it, our organization and an organization that was newly formed at that time, the National Tribal Chairmen's Association, testified that, following a study of what kinds of rules should be implemented, Public Law 93-638 was—in the opinion of our counsel and the tribal leadership, who also engage in lawmaking—that all agencies were covered by 638. And that opinion has not been altered by the amendments recently enacted by Congress pursuant to recommendation by this committee, even though those amendments went only to the Indian Health Service and the Bureau of Indian Affairs. We maintain the position that EPA and any Federal Indian program should be able to be contracted under Public Law 93-638.

If this committee agrees with that position, I would think it a simple matter to recommend to the Appropriations Committee funding to carry out that. If this committee does not agree, or if you think that the Appropriation Committee might not agree, then an amendment would not be out of order.

Something like amending 638, though, would probably take the better part of this Congress, and it sure would be nice to have it done in June, July, and August when the Appropriations Committees meet in conference.

Mr. EBERHARD. Thank you.

Anyone else want to comment on that?

Ms. GARCIA. I'd just like to say that it's probably one of the options that could be available. Like she mentioned, it takes so long for the process to be initiated, and I think the impact and all the other technical details that come along with the 638 process have been monstrous, in itself, and it would need to really be looked at. But it is one of the options that is available to the tribes—should be.

Mr. EBERHARD. Thank you.

Mr. Lester.

Mr. LESTER. Given the great success that 638 has been with the agencies who recognize that it applies to them, I don't see that it really addresses the fundamental questions. As has been interpreted, if a Federal agency doesn't provide a program, then there is nothing to contract, and you get a problem immediately out of the chute on that.

I think there is another issue that has not been dealt with, and that is: it is my understanding and our understanding at CERT that if a tribe does not have a program of its own, the responsibility for monitoring and regulating and enforcing environmental standards falls on EPA. To our knowledge, that is not being done in Indian country.

Now, what little enforcement has occurred has been directed against the tribal governmental institutions rather than other Federal agencies or private operators where the most severe problems emerge.

In that regard, Mr. Chairman, we understand from public documents that the Interior Department was planning to do a review and evaluation of their own compliance in environmental protection standards in the BIA field operations and facilities. Several months have passed since it was made public that was their intent, and we are beginning to get some suspicion that perhaps they've got cold feet in taking a look at their own compliance issues, and we'd like for this committee, perhaps in the exchange of questions and information, to ask where that study and review and evaluation is and if we can expect it to move forward.

Mr. **Eberhard**. Thank you. I'm sure that Chairman Inouye and Vice Chairman McCain will agree to inquire of the Bureau about that.

Mr. **Lester**. I would hope that you would direct the inquiry to the Secretary.

Mr. **Eberhard**. Should there be a Federal effort to improve educational opportunities for Indian people in the area of environmental regulatory programs—the various scientific disciplines that go into all of that and the management and administrative skills and capabilities that are required? And if that is the case, what Federal agency should be tagged with the responsibility for administering such a scholarship program? When I say "scholarship," I guess I should qualify that as scholarship and training program, if you will. I open that up to the entire panel.

Ms. **Harjo**. Yes, and the EPA through the tribes.

Ms. **Garcia**. I'd say yes, and possibly leaving that discretion up to the tribes within certain regions or areas to decide.

Mr. **Lester**. Of course we would—since that is one of our recommendations, we obviously wholeheartedly would say yes to that question, Mr. Chairman, and say that each agency who has a responsibility in the area of human development—education, training—be it, the Bureau of Indian Affairs, the Indian Health Service, EPA, or any other agency, should look at itself and make the contribution to the education and training of the Indian people as well as tribal staff who are currently on board.

If you recall, the tribal witnesses talked about the flexibility that they have in terms of cross-training, and that tribal personnel often carry out multiple program responsibilities in the field. So the current tribal staff are an obvious place to start the training effort, and it is a multi-agency responsibility.

Mr. **Eberhard**. In general, should the BIA be required and mandated by the Congress to play a larger role in improving the capability of tribal governments to regulate reservation environments? Again I throw that to the whole panel.

Mr. **Lester**. We have been advocating just that for the last ten years with succeeding administrations of the BIA. They do not admit such a broad mandate with respect to tribal government and carrying out of governmental responsibilities.

It has been our experience that they admit only to a commitment to assist tribes to our interfacing with them on specific BIA programs, and so their view tends to be not tribes as sovereign units of government, but rather tribes as administrative subdivisions of their own organization.

Mr. **Eberhard**. Is there a role in this for ANA with respect to increasing tribal capacities in the area of environmental regulation?

Mr. **Lester**. Mr. Chairman, if I may, the first agency to provide grant funds to the tribes to define their own environmental programs and to deal with their first priorities in environmental protection was the Administration for Native Americans in 1980 in cooperation with the Environmental Protection Agency.

That program solicitation brought to the fore significant, practical solutions that the tribes could apply to critical environmental programs as they perceived them.

It is our opinion at CERT that the concept of tribal self-sufficiency includes the capability of carrying out fundamental responsibilities in self-government, and that all modern economies throughout the world incorporate the concept of environmental protection and paying the costs of environmental protection as part of the concept of the modern economy. There can't be any concept on reservations that economic self-sufficiency can exist without environmental protection. The two must go together.

Ms. **Garcia**. I would just say that as far as the BIA is concerned as far as taking the role in that, as evidenced in prior testimony, the amount of money put in for environmental functions for tribal governments was very minimal and each year it goes down, as well as the water resource funding. I think this piecemeal approach has continuously gone on, and it is time that BIA, since it is their trust responsibility, as well as EPA and IHS—we need to come together to bring this funding together for an overall plan on reservations. The responsibility and the commitment lie with the agencies, and the one that sustains the burden the most is the tribe and its people.

I wouldn't know whether I would want to trust them in that role, whereas what they testified today didn't represent a good trust responsibility to the tribes.

Ms. **Harjo**. Of course OMB is the fund culprit in this. When the House Interior Appropriations Committee earmarked funds for the BIA to identify and begin to clean up hazardous waste sites, OMB prevented BIA from doing that. And, as I understand the story—and I don't know if this is fully accurate—EPA objected to OMB or OMB objected on its own to BIA having a prominent role in the hazardous waste issue because of the existence of Superfund, which is within the jurisdiction of EPA.

BIA had attempted, at a program level, to identify those sites which likely would not make it to the national priority list of Superfund and for which there would be no funding for clean-up. For those sites below the Superfund NPL, there is no money through EPA, so for those very serious and dangerous sites that aren't quite the most serious in the country, there is no help.

The Spokane site I don't believe is a Superfund site yet. There is very little help, thus far, for those three Indian sites that are Superfund sites, and there is really nothing happening for the tribes that have the benefit of other people's waste and toxic materials and hazardous materials on or near their reservation.

This sort of bureaucratic—I won't even call it "hot potato" reaction. It is more like just turning their backs on the problem, rather than trying to even redirect jurisdiction for the problem to someone. The agencies seem to want to have control over the program without spending money to implement it—whatever it may be. And there needs to be some coordination there, more than there is—certainly more than a weekly or monthly meeting. Congress has to bring all of the agencies together—the Department of Agriculture and the others mentioned thus far which have jurisdiction in this area, and the Department of Energy—and help them decide, with or without OMB, how this is going to be done on the federal side of it. Then that would certainly help the tribal side of things. And, at the same time, there needs to be more flexibility allowed for tribes to mix and match funds to address these problems.

Mr. **Eberhard**. Thank you all very much. I have no further questions at this time. As with all witnesses today, we do plan to submit to you some additional written questions and would appreciate your cooperation with us in providing us with some written responses during the next 30 days.

[Questions and answers thereto appear in appendix.]

The **Chairman**. Our final panel consists of: The Director of the Office of Program Management, Office of Air and Radiation, Mr. Paul Rasmussen; the Deputy Assistant Administrator, Office of Water, EPA, Mr. William A. Wittington; the Acting Deputy Assistant Administrator, Office of Solid Waste and Emergency Response, EPA, Mr. Robert Duprey; and the Director of the Office of Federal Activities, Office of External Affairs, EPA, Mr. Richard E. Sanderson.

I thank all of you for assisting us this afternoon.

STATEMENT OF PAUL RASMUSSEN, DIRECTOR, OFFICE OF PROGRAM MANAGEMENT, OFFICE OF AIR AND RADIATION, EPA, WASHINGTON, DC

The **Chairman**. I would like to ask the following questions, if I may.

Mr. Rasmussen, how many tribes submitted air quality implementation plans to EPA?

Mr. **Rasmussen**. Eight so far, Mr. Chairman.

The **Chairman**. Eight? And how many tribal implementation plans has your agency approved?

Mr. **Rasmussen**. We have not approved any, and that's one of the reasons that we want to pursue changes to the Clean Air Bill with tribal amendments to rectify that problem. The current act is unclear as to the relationship for Federally-enforceable plans on Indian reservations. There is only one section of the act that speaks to the tribes, and it isn't the enforceability of plans. We feel the statutory change would rectify that.

The **Chairman**. With the amendments I would assume that you would support the equal treatment of tribes and States?

Mr. **Rasmussen**. Yes, sir.

The **Chairman**. Thank you very much, sir.

Mr. **Rasmussen**. Thank you.

STATEMENT OF WILLIAM WHITTINGTON, ACTING DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF WATER, EPA, WASHINGTON, DC

The CHAIRMAN. Mr. Whittington, has EPA completed promulgation of all regulations necessary to implement the Indian amendments to the Clean Water Act?

Mr. WHITTINGTON. It has not, Mr. Chairman. There are some six regulations required to be interpreted under the Clean Water Act. We have completed three of those; three are not.

We have chosen to concentrate our priority efforts, in fact, on those regulations which deal with money, in a word. Those three, to do with construction grants and 106 program grants and treatment of tribes as States for purposes of construction grants, are, in fact, in place—either as interim final or final.

The difference is that under grants we can use interim final approach. Because of the Administrative Procedures Act we must both propose and go final on the Water Quality Standards Rule, the 402 NPDES rule—that's National Pollution Discharge Elimination System rule—and the 404 Wetlands Protection Rule.

The CHAIRMAN. Do you believe there is any need to amend the present act to bring about greater ease in implementation?

Mr. WHITTINGTON. I can give you my personal views on that. I think there are some things that would have been very helpful to have had as we have come through it.

The CHAIRMAN. Can you submit suggested language to us? We would like to look it over if we may.

Mr. WHITTINGTON. I'd be glad to do that.

[Information to be supplied follows:]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 20 [illegible]

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Administration of EPA Indian Programs -- June 23, 1989
Hearing Testimony

William A Whittington Jr
FROM: William A. Whittington, Acting Deputy Administrator
for Water

TO: John Mogavero, Printer/Editor

Attached please find corrections to the subject transcript. These changes are generally editorial in nature.

Please note that on page 92 of the testimony, the Chairman asked me whether there is any need to amend the present Act to bring about greater ease in implementation. He asked that I submit suggested language that would help bring this about. Such language must be developed carefully allowing for appropriate input and approval across the Agency and perhaps by other agencies. The Agency will submit such language after the appropriate review process has been undertaken, but that will not be available in time for this record.

Thank you for the opportunity to review and make corrections to the transcript.

cc: Doug Cooper
Ken Wood (OLA)
Martin Topper (OFA)

The CHAIRMAN. How much funding is your agency seeking in fiscal year 1990 to implement Clean Water Act regulatory programs on reservations?

Mr. WHITTINGTON. In fiscal year 1990 we are seeking—you said Clean Water Act, Mr. Chairman, not Drinking Water Act?

The CHAIRMAN. Just Clean Water Act. The next one is Safe Drinking Water.

Mr. WHITTINGTON. Let me just read them here as I have them on my sheet: Under the Safe Drinking Water Act, Public Water Supply and the Drinking Water Act, $1,213,000; underground injection control; $525,000. In both of those cases, the money is broken into what is called primacy money, which is for use by the tribes, and direct implementation money, which is for use by the EPA in acting on those places where tribes have not taken primacy. Under the Clean Water Act: 106 program, $2 million; construction grants would result in $2 million by virtue of a set-aside. The total, as we make it here, is $5,738,000.

The CHAIRMAN. I don't suppose this is sufficient, but what would you consider to be adequate?

Mr. WHITTINGTON. We have to base that on what the activity is. Right now with the activity we have I'm facing a problem that isn't 1990, it is 1988 and somewhat 1989, but mostly in terms of 1988 money. That money, in certain cases, will expire in the end of September and we'll have to be very creative about how we can keep that money available to us to use.

As far as sufficient amounts, we have a very difficult time and very little basis on which to budget those amounts projecting ahead two years. These represent our best estimates of what the need will be at that time.

The CHAIRMAN. OK. Thank you very much, sir.

STATEMENT OF ROBERT DUPREY, ACTING DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, WASHINGTON, DC

The CHAIRMAN. Now, Mr. Duprey, how many open dumps are now operating on Indian reservations?

Mr. DUPREY. We actually don't have an exact inventory throughout the country. There have been pilot programs done in two regions. In Region VIII—which is where I'm from permanently, by the way; I'm on a detail to the acting deputy position—we did a survey and found somewhere around 40 open dumps throughout reservations in the western States. In Region V they found close to 60 in the midwest. We don't have an exact count, but certainly there are hundreds.

The CHAIRMAN. How much funding are you requesting for the regulation of solid and hazardous wastes on Indian lands for fiscal year 1990?

Mr. DUPREY. In fiscal year 1990 our request is for $1,280,000.

The CHAIRMAN. Now, will your agency support the treatment of tribes as equal to States in the Reauthorized Resource Conservation and Recovery Act?

Mr. DUPREY. Yes; very much so. We, in our report to Congress last year, recommended that tribes are treated as States. But I think we also have to work on the particular problems of solid waste and the funding issues that relate to the need to take care of sanitation needs on solid waste.

The CHAIRMAN. I see.

STATEMENT OF RICHARD E. SANDERSON, DIRECTOR, OFFICE OF FEDERAL ACTIVITIES, OFFICE OF EXTERNAL AFFAIRS, EPA, WASHINGTON, DC

The CHAIRMAN. Mr. Sanderson, I think one can say that despite good intentions and the valiant work of many of your dedicated employees and tribal employees, the EPA Indian policy has been less than a success. I think everyone agrees to that.

What can we, in the Congress, do to assist you and the tribes?—other than providing more money, that is.

Mr. SANDERSON. I think the discussion that you had with the deputy administrator early on led to the kind of conclusion that would be most helpful.

I think the direct participation of this committee in oversight and the sensitivity to the various committees which have the particular legislation in front of them will be extremely helpful. At the same time, although I certainly admired the additional scope of responsibility which you assumed, we in EPA cannot duck the fact that we have an enormous amount to do working with the tribes.

It has been, as each of the witnesses have indicated, a change in our culture of how we do business, the kinds of issues that we have to face.

The Environmental Protection Agency normally deals on a risk-based analysis. That's what we're in business to do—to protect human health. We normally look at large populations and small land masses. You have precisely the reverse in Indian country. You have an area the size of New England, Maryland, New Jersey, and Delaware, with about two million people on it. Those are the kinds of decisions we need to work through, and the Agency is making enormous efforts internally to cope with this definitive distinction between the way we normally do business and the way business is needed to be done in order to take care of this unusual, highly necessary problem to work with the Indian tribes.

The CHAIRMAN. In order to facilitate your work, do you believe changes have to be made in the law to help you implement your Indian policy?

Mr. SANDERSON. Certainly the types of individual, media-specific appropriations and authorizations are difficult to implement with small communities of people who have broad multi-media requirements. The laws are set on media-specific bases with appropriations normally following those media-specific issues.

We believe, as Mr. Habicht said earlier today, that there may be some interim steps that we can work through administratively to help alleviate that. We're not there yet, but we think we can be creative enough to take some steps along those directions working with you, with the tribes, with our council, and with our program people. But certainly an enjoinder from the Congress that multimedia issues need to be looked at would be most helpful.

The Chairman. I would like to say that this hearing has given me much reason to be optimistic. This is our first attempt to do some oversight work in this area, and, as some have suggested, this will not be our last.

To all of you, I thank you very much. You have been extremely helpful.

With that, I thank all of the witnesses who assisted us today. We give you our assurance that this will not be our final hearing on these matters. We will continue to monitor the environmental quality of Indian country. That is our promise.

[Whereupon, at 4:44 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

STATEMENT OF
F. HENRY HABICHT II
DEPUTY ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SELECT COMMITTEE ON INDIAN AFFAIRS
U.S. SENATE
JUNE 23, 1989

Good afternoon, Mr. Chairman and members of the Committee. I am pleased to appear before you today. At your request, I will discuss the Environmental Protection Agency's (EPA) efforts to implement its Indian Policy. This is a policy that Administrator Reilly and I take most seriously and we have already met with a number of tribal representatives to discuss the Agency's direction in implementing it. In addition, we have assigned the task of following program implementation to a Special Assistant to the Administrator, Mr. Douglas Cooper, so that we may be kept informed as expeditiously as possible.

Before I discuss our implementation efforts, I would like to present you with a summary of why EPA decided that it needed a formal Indian Policy, and what the Agency believed was necessary to be included in that policy.

BACKGROUND

EPA's statutes, while quite diverse, are generally based on an approach which envisions the development of federal standards and programs, with eventual delegation of the programs to state governments for implementation. Historically none of our statutes addressed Indian tribes, unless they were included under the definition of municipalities. As a result, there were "islands" across the nation where the responsibility for implementing the federal environmental statutes was unclear.

This is not to say that were was no interaction between EPA and the tribes. But the activity occurred on an ad hoc basis, and was too frequently dependent upon the interest and energy of individuals within the Agency. A notable exception, of course, is the public water supply system program under the Safe Drinking Water Act. Partially because of the close involvement of Public Health Service personnel, regulation of community water systems on Indian lands was an integral part of the program from the beginning. EPA's involvement included not only enforcement of the national primary drinking water regulations, but also outreach activities such as technical assistance to tribal operators.

In 1983, President Reagan issued a federal Indian Policy, recognizing the primary role of tribal governments in matters affecting American Indian lands. That policy stressed two related themes: (1) that the federal government will pursue the principle of Indian "self-government" and (2) that it will work directly with tribal governments on a "government-to-government" basis. On November 8, 1984, EPA became the first federal agency to issue a policy pursuant to the President's policy.

In developing its Indian Policy, EPA utilized previously issued general statements of policy that recognized the importance of tribal governments in regulatory activities that impact reservation environments. The Policy consolidated and expanded upon existing EPA Indian Policy statements, and set forth the principles that were to guide the Agency in dealing with tribal governments.

EPA INDIAN POLICY

The fundamental objective of EPA is to protect human health and the environment. The keynote of the Indian Policy is to ensure consideration of tribal interests as the Agency develops policies that affect Indian lands, and to ensure the close involvement of tribal governments in making decisions and managing environmental programs affecting reservation lands. The Policy sets forth nine basic principles that I would like to briefly review.

1. **"The Agency stands ready to work directly with Indian tribal governments on a one-to-one basis (the 'government-to-government' relationship), rather than as subdivisions of other governments."** This principle recognizes the sovereign status of the tribes, and their role as the primary authority for Indian lands. In practice, it means that EPA will not use other governmental entities as intermediaries when working with tribes, whether those entities are state governments or the Department of the Interior. We will work directly with tribes on a government-to-government basis.

2. **"The Agency will recognize tribes as the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations, consistent with Agency standards and regulations."** It is important to note here that we are discussing implementation of federal statutes, since Indian tribes already have the authority to set standards, make decisions, and manage programs as a matter of tribal law.

3. **"The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands."** This commitment is basically to treat tribes in the same manner as the Agency has treated states. Where EPA retains the responsibility for managing programs on the reservations, the Agency will encourage tribes to participate in policy-making and to assume a partial role in program management as appropriate. It should be noted here that the Agency would not approve state government assumption of program responsibilities for reservations lands unless that government could demonstrate an express grant of jurisdiction from Congress or similarly compelling legal authority sufficient to support regulation by the state government.

4. **"The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation problems."** As

EPA reviews and evaluates existing statutes, regulations, policies, and other decisions and actions, it will work to ensure that the language used explicitly enables a recognition of and direct relationship with tribal governments.

5. **"The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments."**
This principle again commits the Agency to work to protect the environmental interests of Indian tribes when carrying out its responsibilities that may affect the reservations.

6. **"The Agency will encourage cooperation between tribal, state and local governments to resolve environmental problems of mutual concern."** Pollution does not recognize political boundaries, and it is clear that effective environmental management, domestically and internationally, requires the coordination and cooperation of relevant governing bodies. I would note here that our activities thus far have shown that such cooperation can be successful and cost-effective in addressing environmental problems.

7. **"The Agency will work with other federal agencies which have related responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes**

assume environmental program responsibilities for reservations." It is clear that within the federal government we have a number of related responsibilities and authorities that affect tribal lands. Coordination, especially of information and resources, can lead to more effective programs. Lack of coordination can waste resources and confuse tribal leaders.

8. **"The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations."** Where facilities are owned by private parties, the Agency commits to work in cooperation with the tribal government, but will otherwise respond to noncompliance as it would elsewhere in the country. Where the facilities are owned or managed by tribal governments, however, the Agency does commit to working with the tribes to achieve compliance rather than automatically activating a formal enforcement response. A judicial or administrative approach will be considered, however, where EPA determines that (1) a significant threat to human health or the environment exists, (2) such actions would reasonably be expected to achieve effective results in a timely manner, and (3) the federal government cannot utilize other alternatives to correct the problem in a timely fashion.

9. **"The Agency will incorporate these Indian Policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management**

accountability system and ongoing policy and regulation development processes." The intent of this principle is to integrate the consideration of tribal issues and programs into the basic operating fabric of the Agency, as we hope we are continuing better to integrate state and local interests and concerns into our management structure. By "institutionalizing" consideration of Indian tribes, the Agency will ensure that they receive consistent attention under the federal environmental statutes.

CONSTRAINTS

At this point, I must point out that when the Indian Policy was issued EPA tried to make it clear that implementation would occur at a measured pace. That prediction has proved accurate. And while I believe that tribal leaders have generally been quite understanding, it is clear that many are frustrated by the pace and believe that it should be substantially accelerated. I, too, would like to see that pace accelerate and believe that it is accelerating, although probably not as rapidly as many would like.

One constraint is the limited resources and technical expertise within the tribes for environmental programs. The EPA resources to support tribal environmental programs generally come from the resources that support state programs. At the same time federal requirements on states and tribes are increasing. I can see that few tribes have environmental programs in place or have significant environmental expertise; generally they would use resources to initiate programs rather than to maintain existing programs as the states are basically doing.

Further, the Agency develops its priorities and allocations largely on the basis of risk to health and the environment. This approach, which we have judged appropriate given the nature of our programs and resources, tries to protect the greatest number of people with the available resources. This approach does not naturally channel resources to Indian tribes, which typically have small populations that are dispersed on large land masses and, in many cases, are remote from industrial centers where significant levels of pollution are more prevalent. We are examining the effects to ensure that Indian tribes and reservation environments are adequately protected from risks.

The sheer number of tribes also presents a challenge, but not in our view an insurmountable one. Over the years we have developed what we believe is a successful partnership with the fifty state governments. We are now committed to developing the same sort of partnership with tribal governments - the governments of approximately 280 reservations in the contiguous United States and about 220 Alaska Native Villages. This is a formidable challenge, although I do believe that we can successfully meet it.

Finally, while we have made the commitment to treat tribes as states, it is obvious that they are not states. Considerable variation and diversity exist in tribal environmental problems, priorities and resources, and cultures. EPA is committed to working with the individual tribes to develop appropriate programs for the reservations. Our experience in working with state governments will certainly be helpful. And we will certainly depend upon the expertise and technical information provided by the Bureau of Indian Affairs and the Indian Health Service. In the long run, however, we believe that most of what we need to know will come from the individual tribes as we work with them to develop programs. This will take time.

ACCOMPLISHMENTS

Having said all that, I would now like to discuss what the Agency has accomplished since the issuance of the Indian Policy. EPA has demonstrated a steady, gradual increase in its Indian activities. A summary of what the Agency has accomplished in the four and one-half years since the adoption of the Indian Policy follows:

GENERAL ACCOMPLISHMENTS

o The Agency has worked with Congress and the tribes in the development of Indian amendments to the Safe Drinking Water Act, the Clean Water Act, and the Superfund statute. EPA is requesting in the proposed Clean Air Act amendments that Congress amend the Clean Air Act so that tribes can apply to be treated as states. There would be a need for a similar type of amendment if the Resource Conservation and Recovery Act comes up for reauthorization. Where Acts have been amended the Agency has worked to issue first those regulations that are associated with grant programs, so that funding could be provided to tribes at the earliest possible time.

o Even where Acts have not been amended, the Agency has still sought to find ways to include tribes in its programs. Funds are being provided for environmental protection activities on reservations in the areas of air quality, pesticide control, asbestos mitigation, and solid waste management planning.

o The Agency has conducted a small number of pilot programs to gain knowledge of how to work with tribal governments in the most effective manner when developing environmental programs on Indian lands.

o The Agency has modified its operating guidance to reflect its Indian Policy by specifically addressing tribes in the guidance for each Agency activity which applies on Indian lands.

o While the resources available for environmental protection have been very limited, the Agency has gradually increased the workyears devoted to Indian activities over the past four years. In Fiscal Year 1988 EPA devoted 77 workyears and spent $6.9 million on Indian activities.

o The Agency has provided technical assistance to tribal governments in the form of both direct assistance from EPA staff and in the form of contracted assistance from private sector consultants. It has also used the EPA Institute and the EPA Senior Environmental Employee programs to provide tribes with technical assistance.

o The Agency has undertaken a program of training for tribal officials and staff. Training has been provided both on technical subjects and on the Agency and its programs in general. EPA cooperated with the National Congress of American Indians (NCAI) on developing a handbook and a series of meetings about its programs for tribal leaders and staff. The Agency will continue to work with NCAI on updating the handbook and holding further training sessions as programs change. In addition, EPA staff from the Office of Water and the Office of Solid Waste and Emergency Response have held a series of meetings for tribes at locations easily accessible to tribes to explain Agency programs.

o The Agency has conducted a first-cut survey of tribal environmental concerns. The survey indicated that solid waste disposal and water quality were two of the environmental problems that concerned the most tribes. Amendments to the Clean Water Act and Safe Drinking Water Act have allowed the Agency to begin to address tribal concerns about water quality. The Agency has begun to assist tribes with solid waste management planning, but amendments to the Resource Conservation and Recovery Act would be necessary before EPA could fully include tribes in the national system of solid waste management.

o The Agency has developed an Indian Communications Plan to facilitate the development of a dialogue between EPA and tribal officials and staff. The plan calls for the identification of EPA staff in both headquarters and the regions who will be assigned to provide information and technical assistance to tribal governments.

o The Agency has developed memoranda of understanding and other cooperative relationships with other federal agencies to facilitate the development of environmental protection activities on Indian lands. As part of this effort EPA hosts an interagency meeting on Indian environmental issues several times a year, and EPA staff participate in meetings held by other agencies.

o Finally, the Agency has begun a program of training its own staff about the unique problems and obligations involved in applying federal programs on Indian lands.

PROGRAM-SPECIFIC ACCOMPLISHMENTS

As the Agency as a whole has moved forward in the implementation of its Indian Policy, individual program offices have made a number of program-specific contributions to the protection of the environment on Indian lands.

o Office of Air and Radiation. The Office of Air and Radiation (OAR) has included tribes within its Clean Air Act Section 105 grant program and has supported the development of tribal air quality monitoring programs. This fiscal year OAR will provide over $900,000 for the support of such programs. Several tribes in Region 8 have developed air quality management plans under these grants. Assuming the Clean Air Act is reauthorized with the proposed Indian amendment, EPA's authority to give federal approval to these air quality management programs would be clarified. In addition, OAR has included tribal homes in its nation-wide radon survey.

o Office of Pesticides and Toxic Substances. In the area of pesticide certification and control, the Office of Pesticides Programs has delegated the federal certification program on the Ft. Berthold Reservation to the tribal government. It is the first delegation of a federal environmental program to an Indian tribe. In addition, the Office of Pesticides Programs has established cooperative agreements with fourteen tribes for the management of pesticide application on Indian lands. Training on pesticide use has also been provided to tribal staff.

The Office of Toxic Substances has spent $875,000 on 95 asbestos abatement projects in Indian schools in the past four years through a cooperative arrangement with the Bureau of Indian Affairs (BIA). (It should be noted that the Asbestos Hazard Emergency Response Act specifically provided for funding for BIA schools.) In addition, it has provided $1 million to the BIA to conduct asbestos inspections in Indian schools and to develop asbestos management plans for them.

o Office of Water. The Office of Water has been especially active in the Indian program since Indian amendments were added to the Safe Drinking Water and Clean Water Acts. EPA has now issued the regulations and guidance needed to award grants under the two Acts. The Agency is in the process of reviewing grant applications from tribes and expects to issue the first grants to tribes for drinking water and water quality management programs this year.

In addition, as a result of the amended Clean Water Act, the Office of Water is funding five pilot projects for wastewater treatment facility construction. The lessons learned in making these pilot grants have contributed to guidelines for grant applications which the Office of Municipal Pollution Control has sent to all federally-recognized tribes and Alaska native villages. The first round of grant applications for Indian wastewater treatment facility construction grants under Title II of the Clean Water Act, as amended, is currently under way.

The Office of Water has been active in providing training and in communicating with tribal governments. A notable example is the Office of Drinking Water's Indian fellowship training program for operators of small water supply systems on Indian lands that was conducted in cooperation with the Indian Health Service. Office of Water management and staff also went to several locations near Indian lands to meet with tribal officials and staff to explain their programs and seek consultation as regulations were being developed. Additional consultation occurred in work group deliberations and at a national meeting with tribal representatives last June. A follow-up national meeting is being held next week, with both states and tribes participating in the same session. Last year separate sessions were held.

Finally, the Office of Water has worked to evaluate environmental problems on Indian lands. It has conducted a study of wastewater treatment facility needs on Indian lands which indicated that there

are approximately $270 million in needs for services to existing Indian homes. In addition, it conducted a study of drinking water systems that identified problems and whether there was a need for alternative drinking water supplies on specific reservations.

o Office of Solid Waste and Emergency Response. The Office of Solid Waste and Emergency Response (OSWER) has been active in a number of areas. In its Superfund Program, it has provided emergency responses to releases of hazardous substances on Indian lands, proposed sites on Indian lands for inclusion on the Superfund National Priorities List, conducted a major clean-up at the Celtor Site on the Hoopa Reservation, signed a Superfund "state" memorandum of agreement with the Navajo Tribe, and developed and distributed a handbook to tribes on how to bring potential hazardous waste sites to the Agency's attention. It also has proposed a regulation to fill a statutory gap regarding the implementation of Title III of the Superfund Amendments and Reauthorization Act on Indian lands.

Although the Resource Conservation and Recovery Act (RCRA) has not been amended to allow EPA to treat eligible tribes as states, and is constrained by the inclusion of tribes under the definition of "municipality," the Agency has sought ways to include tribes in its programs. It has developed three pilot projects through the Underground Storage Tank Program. These projects are aimed at determining the scope of underground storage tank problems on Indian lands in Regions 5, 8 and 9. In addition, OSWER is conducting a limited number of solid waste management pilot projects on Indian lands. While these activities under RCRA are limited due to the tribal definitional constraints, these projects will provide valuable experience if the Act is amended to allow tribes to fully participate in RCRA programs.

OSWER has also been active in the area of training. It held three meetings near Indian lands to discuss its programs with tribal officials and staff. It has also worked with the Federal Emergency Management Agency to develop a series of grants to Indian tribes to provide their members with training to develop programs to fulfill the requirements of Title III of the Superfund Amendments and Reauthorization Act.

Within existing resources the Agency has made a concerted effort to extend the national system of environmental protection to Indian lands. During the last four and one-half years, EPA has developed a baseline of experience in working with tribal governments from which to continue.

FUTURE DIRECTION

As the foregoing discussion demonstrates, EPA has been moving forward in this important area in a number of ways and the Administrator desires, in consultation with the tribes and the Congress, to develop an effective, unified strategy for the years ahead. In the area of legislation, the addition of explicit "Indian" authority to the Clean Air Act, the Resource Conservation and Recovery Act, and to parts of the Federal Insecticide, Fungicide and Rodenticide Act and the Toxic Substances Control Act (Title III, Indoor Radon Abatement) would be needed for tribes to assume program rsponsibilities. The Agency's ability to authorize tribes to operate federal environmental programs under current versions of these Acts is limited by a lack of express statutory authority to treat tribes as states. For example, although the Clean Air Act clearly applies on reservations, it contains no language expressly authorizing the Agency to approve tribal air quality implementation plans.

Under the Resource Conservation and Recovery Act (RCRA), Indian tribes are mentioned in the Act only under the definition of municipalities. This prevents the full involvement of tribes in the area of solid waste management under the Act, even though solid waste is a major concern on reservations. This deficiency and the need for a statutory amendment to rectify the problem were also noted in our 1988 report to Congress on solid waste management in the United States. Certainly, amendments to the Clean Air Act and RCRA and to other pieces of EPA's authorizing legislation would be important for the continued development of environmental protection programs on Indian lands.

EPA is making resources available to tribes. EPA provides technical assistance, and has undertaken a program of graduated increases in its Indian activities. The Agency intends to continue in the direction of increasing its commitment to the Indian Program, drawing resources from funds allocated for state programs in an incremental manner. Because the major environmental risks to human health in the United States will often lie in urban areas distant from reservations, however, this will have to be accomplished with care.

With regard to program activity, there will be considerable new activity in the area of wastewater treatment facility construction, as the statutory set-aside under Title II of the Clean Water Act is made available to tribes. In addition, Agency management and staff intend to work closely with Congress toward the passage of Indian amendments to the Clean Air Act during this session of the Congress. We certainly intend to give Congress our full cooperation in the effort to get Indian amendments enacted into law.

The Agency intends to press forward with its grant programs to tribal governments and join in partnership with tribal officials in the effort to assist tribes in achieving the level of environmental protection that the states now enjoy. We realize that this will be difficult because the states have had a significant head start. EPA will focus on providing outreach, technical assistance and training to tribes, so that they can make informed decisions concerning the kind and level of environmental protection programs that will be necessary to protect the health and environment of their peoples.

The future confronts us with a number of challenges that will have to be met, but with the challenges will come opportunities to create new and tailored approaches to ensuring environmental protection for Indian lands in the United States. We intend strongly to promote cooperative efforts among the relevant federal agencies and, as appropriate, state agencies effectively to support this effort. In the end, however, success can come only with the full involvement and participation of Indian tribal leaders. Administrator Reilly and I are committed to support these leaders in this task.

Thank you for the opportunity of appearing today to present this testimony. I will be glad to answer any questions that you may have, and EPA looks forward to working with you and your colleagues as we address these issues of mutual interest.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 13 1989

OFFICE OF
THE ADMINISTRATOR

Honorable Daniel K. Inouye
Chairman
Senate Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your July 17, 1989, request for additional information concerning the Environmental Protection Agency's (EPA) Indian Program. Question-specific answers are contained in Attachments 1-5 of this letter. Attachment 6 is the response to a question that was asked of Mr. William A. Whittington, Acting Deputy Assistant Administrator of the Office of Water, at the June 23 oversight hearing.

In reviewing the questions, I have noted that there appears to be a concern regarding enforcement on reservations, in addition to the basic concerns over the level of support, both in direct funds and in training and technical assistance, that EPA is providing to tribal governments. We are currently preparing to reorganize a number of our programs, and as part of this reorganization the Office of Federal Activities (OFA) will become part of the Office of Enforcement and Compliance Monitoring (OECM). We believe that OECM will provide a strong base for OFA's coordination and oversight role in EPA's Indian Program. I would note, however, that the emphasis will be on working with the tribal governments to ensure compliance with the laws; the move does not signal a conventional enforcement approach. We will also have a government-to-government liaison function with tribal governments through the new Office of Regional Operations and State Relations and through Douglas Cooper, Special Assistant to the Administrator.

EPA expects to develop regulatory partnerships with tribes, an effort that is part of the larger effort to develop the national system of environmental regulation that is required by EPA's authorizing legislation. This will present many tribes with an opportunity to exercise their sovereignty and participate in the federal system in a manner that they may not have previously experienced. The tribes are accustomed to working with agencies such as the Bureau of Indian Affairs and the Indian Health Service, which primarily provide direct services on Indian lands. As they develop their environmental programs under the federal statutes, they will be participating in a program that defines its priorities and activities on a national basis. This will present challenges and opportunities for both EPA and the tribes, and we will need to work together closely to ensure that a strong framework for this effort is developed.

As I discussed in my testimony before your committee, EPA is committed to working with Indian tribes on a government-to-government basis to develop these programs. We will need to focus on providing outreach, technical assistance and training to tribes, so that they can make informed decisions concerning the kind and level of environmental protection programs that will be necessary to protect the health and environment of their peoples. We are committed to accelerating these efforts in the future. We shall also work to identify and remove the "bureaucratic" complexities and barriers that complicate working with tribal governments. We have made a certain amount of progress in all of these areas, but there is still a long way to go.

We welcome the interest of the Senate Select Committee on Indian Affairs, and look forward to working with you in the future as we continue to develop our programs with Indian tribes. We are breaking new ground, and while our past experience with state governments will provide some guidance, the active participation of Indian tribal leaders and the broader Indian Community will play a critical role as we create new and tailored approaches to ensuring environmental protection for Indian lands in the United States.

I appreciate the opportunity to discuss EPA's activities and objectives with the Committee and look forward to working closely with you and your staff as we address further these important issues.

Kind regards, and thanks for your interest -

Sincerely yours,

F. Henry Habicht, II
Deputy Administrator

Attachments

ATTACHMENT 1

RESPONSES TO QUESTIONS CONTAINED IN LETTERS OF JULY 17 AND 18 FROM THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS CONCERNING THE ENVIRONMENTAL PROTECTION AGENCY INDIAN PROGRAM

Question 1: "Referring to page 8 of Mr. Habicht's testimony, when a conflict concerning compliance between tribal and EPA regulations exist, at what point will the EPA seek a judicial/administrative remedy? Will there be a standard or process EPA will follow before seeking judicial or administrative remedies?"

Answer 1: On November 8, 1984, EPA Administrator William D. Ruckelshaus issued the "EPA Policy for the Administration of Environmental Programs on Indian Reservations." On the same date, the "Indian Policy Implementation Guidance" ("EPA Guidance") was issued by EPA Deputy Administrator Alvin L. Alm. Both documents (attached for your review as Attachment 2) were intended to guide the Agency in dealing with tribal governments in a manner consistent with the Federal Indian Policy, announced by the President on January 24, 1983.

EPA continues to follow the enforcement guidelines as set forth in these documents. The EPA Guidance states on page 5, Section 6:

> "Where EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments...."

On page 6, Section 8, the EPA Guidance states:

> "The EPA Indian Policy recognizes Tribal Governments as the key governments having responsibility for matters affecting the health and welfare of the Tribe. Accordingly, where tribally owned or managed facilities do not meet Federally established standards, the Agency will endeavor to work with the Tribal leadership to enable the Tribe to achieve compliance...."
>
> "Actions to enable and ensure compliance by Tribal facilities with Federal statutes and regulations include providing consultation and technical support to Tribal leaders and managers concerning the impacts of noncompliance on Tribal health and the reservation environment and steps needed to achieve such compliance....
>
> "...[D]irect EPA actions against Tribal facilities through the judicial or administrative process will be

> considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Regional Administrators proposing to initiate such action should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel..." (Emphasis added.)

Both the EPA Indian Policy and associated Guidance present the Agency's intention that violations of environmental statutes and regulations by tribally owned or managed facilities will not initially be treated in precisely the same manner as violations by other entities. This does not mean that the Agency believes that national standards need not be met on Indian lands. The Agency will work with tribal leaders and managers to assist the tribes to achieve compliance with Federal statutes and regulations before any type of formal enforcement action is taken. If, after providing consultation and technical support, the tribally owned or managed facility does not make a serious attempt to come into compliance, a formal enforcement action following normal procedures may be appropriate.

Question 2: "One problem which must be addressed is the real possibility of tribal governments being overwhelmed or unknowledgeable and thus ineffective in dealing with EPA on a one to one basis. Will your agency create an internship or other type of program designed to train/educate tribal officials in environmental matters?"

Answer 2: EPA has begun to consider options for an internship program, but has not yet determined whether such a program is the best way to proceed and, if so, how best to structure such a program. In addition, EPA is currently providing tribal officials with technical training and assistance in environmental protection in a number of other ways. Agency managers and staff from headquarters and regions have worked and continue to work with a number of intertribal organizations to provide training workshops for tribal officials and staff in all areas of environmental protection. These are held in Indian Country to assure ease of access for tribal representatives. A training program developed with the National Congress of American Indians has led to a handbook on EPA programs, the purpose of which is to make it easier for tribal personnel to understand and work with EPA programs. In addition, the Agency has instituted the EPA Institute Scholar and Senior Environmental Employee programs to provide technical assistance and training to tribal environmental protection staff in situ on reservations. In addition, EPA media program offices have provided direct program grants to tribes for the development of tribal environmental protection capabilities. By their very nature, such grants foster the acquisition of environmental protection skills, knowledge, and sophistication on the part of tribal officials and staff.

Question 3: "In a noncompliance situation, will the EPA take into consideration the limited financial and technical capabilities of the tribe before seeking judicial remedies? In what ways will the EPA assist a technically and financially deficient tribe in complying with EPA regulations?"

Answer 3: In a noncompliance situation, EPA will follow the enforcement guidelines as specified in the response to question #1. If, after following these procedures, a decision is made to proceed with a formal enforcement action, EPA will take several factors into consideration in making a determination as to the level and type of enforcement action to be taken.

As an example, for a violation of RCRA, the RCRA Civil Penalty Policy specifies several "adjustment factors" to consider when determining the amount of the penalty. The factors include: good faith efforts to comply/degree of cooperation, degree of willfulness and/or negligence, ability to pay, and other unique factors.

Question 4: "What steps has EPA taken to work directly with tribal governments on a 'government-to-government' basis?"

Answer 4: EPA works with tribal governments on a government-to-government basis by dealing directly with tribal officials and staff on environmental issues that involve EPA's responsibilities under its authorizing legislation. EPA does not utilize other governments or other Federal agencies as intermediaries in conducting its business with Indian governments.

Question 5: "Adequate funding to develop tribal environmental programs and technical assistance are one of the major concerns of tribal governments. How can a replica of the federal/state environmental system be established on tribal land considering the financial and technical barriers tribes face?"

Answer 5: EPA believes that the basic approach outlined in the EPA Indian Policy and the Indian Policy Implementation Strategy will lead to the development of EPA/tribal relationships that will be similar to the relationship that EPA now shares with state governments. Clearly this will take time, and will require flexibility and creativity to develop appropriate and cost-effective approaches to tribal implementation of federal statutes. The financial and technical barriers, while real, are not necessarily insurmountable. The Agency will be making graduated increases in its Indian activities, focusing on training and technical assistance. In the absence of a statutory allocation or set-aside for Indian programs, EPA will continue to draw resources from funds allocated for state programs in an incremental manner.

Question 6: "It has been demonstrated that conventional enforcement methods are not effective in bringing tribes and native villages into compliance with EPA regulations and requirements. Do you plan to develop any new solutions to this problem?"

Answer 6: The EPA Indian Policy recognizes that conventional enforcement methods should not be automatically activated in the first instance for tribal violations of EPA regulations and requirements. EPA continues to follow the relevant enforcement guidelines set forth in the EPA Indian Policy and Implementation Guidance. In addition, the Agency expects that a strengthened technical assistance program will result in improved compliance rates.

Question 7: "How much money has EPA expended since promulgation of its 1984 Indian policy on enforcement activities on Indian reservations? Please break this down by region and media."

Answer 7: EPA's enforcement responsibilities apply to both Indian and non-Indian lands. The Agency does not track its enforcement activities on Indian lands separately.

Question 8: "Since 1984 how much money has been expended for enforcement activities on Indian reservations? Please break this down by region and media."

Answer 8: See Answer 7.

Question 9: "How much funding is needed for the identification of hazardous waste sites on Indian lands where these sites do not meet Superfund eligibility requirements?"
and
Question 14: "How will the Agency pursue clean-up actions where the degree of harm fails to place a hazardous waste site on the Superfund eligibility list?"

Combined Answer 9 and 14: The objective of the Superfund pre-remedial program is to examine every site that is on the Agency's inventory of potential hazardous waste sites in the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) and to determine if the site requires further response under Superfund. CERCLIS is the database that is used by EPA personnel for Superfund site, program, and project management. Indian tribes can participate in identifying sites to be added to CERCLIS by reporting releases within their jurisdiction to the National Response Center (NRC). In non-emergency situations Indian tribal governments may call EPA regions directly. Emergencies should be reported to the National Response Center for an immediate response.

The pre-remedial process begins with a preliminary assessment (PA), which involves a site visit and an evaluation of existing data, followed by a site inspection (SI), if warranted, to gather and analyze samples of potentially impacted air, water, and soil, as well as, to gather additional information required to identify potential priority sites. Federally-recognized Indian tribes are eligible to receive Superfund money through a cooperative agreement to conduct PA/SI activities.

Data collected during PAs and SIs are used to evaluate whether sites qualify for a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remedial response. These data are used to calculate Hazard Ranking System (HRS) scores that reflect the relative risks from actual or potential migration of substances through ground water, surface water, and air. One set of criteria is used to rank all sites regardless of location.

Hazardous sites that have an HRS score of 28.5 and meet the criteria established by the National Contingency Plan (NCP) are eligible for inclusion on the list of candidate sites on the National Priorities List (NPL) for Fund-financed remedial response under CERCLA. However, if the situation warrants, a removal may be undertaken using Fund money to mitigate an immediate threat.

There are currently 18 sites in the CERCLIS database which are on Indian lands. The Agency will ensure that the governing body of a Federally-recognized Indian tribe is given the same opportunities as a state for involvement in pre-remedial activities, as required under CERCLA as amended.

Question 10: "Where would the funds come from for the clean-up of these hazardous waste sites? Has the EPA developed or does the EPA plan to develop cost estimates for the clean-up of hazardous waste sites on Indian lands?"

Answer 10: Only those sites on the National Priorities List (NPL) are eligible for Superfund-financed remedial action. If a site is not proposed for the NPL, cleanup may be conducted under laws or funding sources other than Superfund. Examples of such laws under which cleanup may be conducted include the Uranium Mill Tailings Radiation Control Act of 1977 and the Surface Mining Control and Reclamation Act of 1977.

The average cost of a Remedial Investigation/Feasibility Study is $1.1 million. There is another average cost of $750,000 to design a clean-up. The clean-up costs can range from $10 million to $20 million per site. Clean-up costs vary widely depending upon the site, as well as the technology and methodology used to clean it. The Agency has not developed cost estimates for the clean-up of hazardous sites on Indian lands.

Question 11: "How many employees within EPA are assigned Indian-specific responsibilities?"

Answer 11: EPA employees are normally assigned duties by media and program rather than by specific units or the types of governments with which they interact. This facilitates the broad application of very specific and technical skills and expertise. Because of this, the Agency makes an estimate of workyears that are spent on Indian-related activities. This estimate represents the sum of the part-time efforts of a number of individuals. In FY 88 the total number of Agency workyears spent on Indian activities is estimated to have been 77.7.

Question 12: "Under RCRA, EPA has retained primary enforcement responsibility for Indian lands. How much money has the EPA expended on identification of hazardous waste generators on Indian lands?"

Answer 12: EPA does not expend funds specifically to identify hazardous waste generators on Indian or non-Indian lands. Under RCRA Subtitle C, a self-implementing notification process exists whereby generators are required to notify EPA if they generate hazardous waste. EPA will identify a "non-notifier" or generator who has failed to notify the Agency of its activities through various means, including inspections. For example, in Fiscal Year 1988, EPA Region 9 conducted 18 inspections on Indian lands to identify suspected non-notifiers.

Question 13: "In FY '90 how many regional personnel will be charged with the responsibility of inspecting hazardous waste facilities and sites on Indian lands?"

Answer 13: The Office of Solid Waste and Emergency Response has requested six full time equivalent (FTE) positions for conducting compliance monitoring and enforcement activities on Indian lands in its budget proposal for Fiscal Year 1990.

Question 14 has been addressed in the answer to Question 9.

Question 15: "In your Report to Congress on the wastewater needs of Tribes and Native villages your agency appeared to overlook nearly half of Alaska's villages. Why was this?"

Answer 15: EPA's Indian Needs Assessment Report to Congress relied heavily on information provided by the Indian Health Service (IHS) from its Sanitation Facility Data System. EPA took steps to enhance this data by collecting additional information from IHS area and district offices, the biennial EPA Needs Survey database, EPA regional offices, states, individual tribes, and 36 site visits to reservations and Indian communities. For Alaska, we contacted the Alaska Department of Environmental Conservation to obtain data on approximately 30 of the smaller villages and some predominantly Indian metropolitan areas that were not addressed in the IHS baseline data. Special efforts were made to expand upon existing information where the data appeared to be incomplete or missing. However, some villages were unable to provide documentation to EPA detailing their wastewater treatment needs. Inclusion of a tribe's or village's needs in this assessment is not a prerequisite for eligibility under the Indian set-aside program. We plan to provide updated information to Congress as part of the 1990 Construction Grants Needs Survey. The updated data will be based on 1989 IHS estimates and other sources.

Question 16: "According to your assessment, what would the costs be to meet Alaska Native sanitation needs? What proportion does this represent of the needs of all Tribes? Have you an estimate of what additional costs would be for the 100 villages omitted from your assessment?"

Answer 16: EPA addressed only the wastewater treatment needs of tribes and Alaska Native villages in the Indian Needs Report to Congress. Identification of sanitation needs, of which wastewater treatment is only a part, is handled by the Indian Health Service (IHS). The wastewater treatment needs for Alaska Native villages are $69 million or 25% of total Indian needs reported. At present, EPA does not have an estimate of needs for the 100 villages cited. However, we plan to provide updated information to Congress as part of the 1990 Construction Grants Needs Survey. The updated data will be based on 1989 IHS estimates and other sources.

Question 17: "In your assessment do you use a lesser standard for the villages in Alaska than you do in other states? If so, what would the cost be to meet village sanitation needs based on the standards used nationwide? On the basis of nationwide standards, what percent of the nation's dollar needs would be in Alaska?"

Answer 17: EPA used information provided by the Indian Health Service (IHS), the Alaska Department of Environmental Conservation, and Alaska Native villages to estimate wastewater treatment needs in Alaska. That information supported estimates of the cost of immediate actions to provide basic health protection for Alaska Native villages, many of which have no existing collection or treatment facilities, at $69 million or 25% of the total Indian needs reported. Many of these estimates are based on alternatives that provide less than secondary treatment. These alternatives are appropriate for providing basic protection in light of the extremely high costs of constructing, and the difficulty of maintaining, secondary treatment facilities for the arctic and subarctic environments in Alaska and of the likelihood that such facilities would ultimately provide no more protection than alternative facilities. We recognize that this approach resulted in a needs figure lower than one based solely on the cost of providing secondary treatment.

Question 18: "Has your Office of Indian Coordination been given the authority and budget to coordinate programs in native villages and reservations? Or do EPA programs work independently of each other when dealing with reservations and villages?"

Answer 18: EPA does not have a separate Office of Indian Coordination. The Agency has a national Indian Program Coordinator, who is part of the staff of the EPA Office of Federal Activities. This office develops broad based environmental demonstration projects and training activities for the benefit of Indian tribes in the various regions. The day to day activities of the Agency are carried out by the various EPA media program offices (i.e., the Office of Air and Radiation, the Office of Water, the Office of Pesticides and Toxic Substances, and the Office of Solid Waste and Emergency Response) through their headquarters and regional staffs. The Office of Federal Activities works closely with these media program staff members at both headquarters and in the regional offices; one of the objectives of this working relationship is to ensure that the program offices do coordinate their activities as they affect reservations and villages.

Question 19: "Is there something this Congress can do to allow you to move funds between programs in order to address the pressing needs of tribes and Native villages?"

Answer 19: EPA's Office of General Counsel is examining whether, within the constraints of existing grant authorities, tribes may be given flexibility to move funds between programs. After we have completed our review of this legal issue, we will inform you of how much flexibility currently exists.

Question 20: "How often do EPA officials visit Native villages in Alaska? What funds have been budgeted for regulatory programs in Alaska?"

Answer 20: Most native villages in Alaska are so remote that they can only be reached by small planes. Therefore EPA is unable to perform site visits in many native villages because of the high costs of travel. In the past three years, staff from EPA Alaska Operations Offices (located in Juneau and Anchorage), EPA Region 10 Seattle Office, and EPA headquarters have made site visits to 15 or 20 of the over 200 native villages.

While specific program budgeting does not occur for Alaska villages, there are a number of programs which address native issues and concerns. For some EPA programs implementation is carried out with the cooperation of the Alaska Area Native Health Service and the Alaska Department of Environmental Conservation.

Question 21: "Of the $6.9 million spent by EPA during FY '88 to assist Indian tribes, how much was in the form of direct grants or contracts to tribal governments? Please identify the purposes for which these funds were made available to the tribes."

Answer 21: Approximately $3.76 million of these funds was provided in direct grants to tribal governments. They were provided for a variety of purposes including the construction of wastewater treatment facilities and the operation of tribal environmental programs, primarily in the areas of air quality and pesticides. A complete report of EPA activities on Indian lands in FY 1988 is included with this letter as Attachment 3.

Question 22: "The EPA Indian Policy called for the formation of an Indian Work Group (IWG). We understand that such a group was formed and has met regularly over the years. Please identify, by name and position, or title, all of the current members of the IWG. Please provide us with all recommendations made by the IWG since 1984 relating to the implementation of the EPA Indian Policy."

Answer 22: The names of the individuals who serve on the Indian Work Group are attached as Attachment 4. The IWG began issuing recommendations in 1987. A copy of the four sets of recommendations that have been made since then are included as Attachment 5.

Question 23: "As you know, Committee staff will be preparing a survey of the environmental protection needs of the tribes. Please provide us with the names of any EPA employees who will be available to assist in the preparation of the survey. Please provide us with your written comments or recommendations for the formation of the survey instrument."

Answer 23: Mr. Douglas Cooper, Special Assistant to the Administrator, will be available for consultation concerning the survey. As for comments on the instrument, EPA will be glad to provide comments as the instrument is developed by the Committee staff. However, EPA believes that a survey based on a unified site visit methodology and that utilizes trained experts in the various environmental fields could produce results that would better assess the nature and scope of environmental problems on Indian lands. Resources for such a survey have already been approved for the EPA FY 1990 budget by the House Committee on Appropriations. Should these resources be approved by the full Congress, the Committee may wish to depend upon the results of that survey. Certainly we will be available to assist the committee staff if they wish to pursue their own needs survey or if EPA is unable to perform a full field survey.

ADDITIONAL QUESTIONS SUBMITTED BY THE COMMITTEE IN THE LETTER OF JULY 18, 1989.

Question: "The Pueblo of Zuni in New Mexico has advised this Committee of its attempt to get a certification of emergency for its domestic water system. Apparently, both IHS and BIA concur in that request to the BIA headquarters here in D.C. If the request is approved, what will the role of each of your agencies be in addressing the serious water quality problems at the Pueblo?"

Answer: EPA is not involved in requests for a certification of emergency, or its approval or implementation. Such certification is a BIA procedure coordinated with IHS and is independent of any EPA action. However, EPA, through its Dallas Regional Office, is aware of the drinking water quality problems experienced at the Zuni Pueblo. Via the Safe Drinking Water Act, Region 6 is currently providing technical assistance in the form of water treatment plant operator training and training in the collection of samples from the distribution system, and is underwriting the cost of sample analyses at the New Mexico State laboratory. EPA will continue to provide this type of technical assistance at the Zuni Pueblo's request. In addition, EPA will provide any necessary technical assistance to IHS and BIA on design specifications for any new water supply systems constructed at the Zuni Pueblo.

Question: "The Assiniboine and Sioux Tribes of the Fort Peck Indian reservation in Montana have advised the Committee of problems involving interagency management of oil and gas development on the reservation. BIA, EPA, BLM, the Tribe, and the State of Montana are all involved in leasing, drilling, production, disposal, and closure depending on ownership of a given well. This has led to surface and groundwater problems on the reservation. Is there a plan to coordinate activities at the tribal level? Will the tribe be the lead agency, with help from BIA, IHS and EPA or should a federal agency take the lead? How will this matter be finally determined?"

Answer: The Fort Peck Assiniboine and Sioux Tribes have submitted an application to EPA for Treatment as a State (TAS) for the Underground Injection Control (UIC) program under the Safe Drinking Water Act. The TAS application is the first step in the process toward achieving UIC program authorization and is needed in order to get a development grant which is used in obtaining final UIC program authorization.

Once the Tribes receive UIC authorization, they will be able to issue or deny permits for UIC-related injection activities on the Fort Peck reservation. Until such time as the Tribes receive UIC authorization, the federal UIC program on the Fort Peck reservation will be implemented by EPA through the Denver Regional Office. Unfortunately, achieving UIC program authorization will not in and of itself solve the Tribes' problems in dealing with the various federal and state agencies involved in leasing, drilling, production, disposal and closure of oil and gas wells.

The UIC program regulates disposal activities associated with production wells and injection for secondary recovery of oil and gas, including construction, operation and closure of disposal and secondary recovery wells. It does not regulate the construction and operation of production wells. EPA supports the Tribes' desire to be the lead agency for the control of surface and groundwater problems on the reservation. Obtaining UIC program authorization would be a positive step towards the development of a coordination mechanism with the Tribes as the lead. We are not aware of any plans on the part of the other federal agencies to take the lead in these areas. Certainly, with or without a delegation, should the Tribes want to assume a coordinating role, EPA would support such a role.

ATTACHMENT 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
EXTERNAL AFFAIRS

INDIAN POLICY
U.S. ENVIRONMENTAL PROTECTION AGENCY

Attached are two documents which were adopted by the Environmental Protection Agency (EPA) on November 8, 1984, relating to Indian Tribes and Federal programs for protection of reservation environments:

1) EPA Policy for the Administration of Environmental Programs on Indian Reservations.

2) Indian Policy Implementation Guidance.

These documents lay the groundwork for EPA management of the Agency's regulatory programs on reservation lands. The cornerstones of the Policy and Guidance are the principles of Indian "self-government" and "government-to-government" relations between the Federal Government and Tribal Governments. Through implementation of the Policy, the Agency hopes to realize the long-range objective of including Tribal Governments as partners in decision-making and program management on reservation lands, much as we do with State Governments off-reservation.

In the beginning, implementation of the Policy will be slowly paced, as the Agency will need to seek legislative authority in many areas and go through a lengthy budget process before we can carry out the principles of the Policy and directives of the Guidance in a comprehensive manner. In the first year, however, we will begin to seek statutory changes, modify regulations, and work on selected pilot programs. These pilot programs will investigate problems associated with Tribal regulation of water and air quality and the handling and disposal of hazardous materials on reservation lands. The experience will help both EPA and the Tribes develop models for dealing with these problems in the special legal and political context of Indian reservations.

Environmental programming that will involve Tribal Governments in the Federal regulatory process on a significant scale is a new endeavor for EPA and Tribes alike. To be successful, we will need cooperation and assistance from all sectors and would welcome your on-going support.

If you have questions or need further information, please contact Leigh Price, National EPA Indian Coordinator, at (202) 382-5051.

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 8 1984

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Indian Policy Implementation Guidance

FROM: Alvin L. Alm
Deputy Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel

INTRODUCTION

The Administrator has signed the attached EPA Indian Policy. This document sets forth the broad principles that will guide the Agency in its relations with American Indian Tribal Governments and in the administration of EPA programs on Indian reservation lands.

This Policy concerns more than one hundred federally-recognized Tribal Governments and the environment of a geographical area that is larger than the combined area of the States of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine. It is an important sector of the country, and constitutes the remaining lands of America's first stewards of the environment, the American Indian Tribes.

The Policy places a strong emphasis on incorporating Tribal Governments into the operation and management of EPA's delegable programs. This concept is based on the President's Federal Indian Policy published on January 24, 1983 and the analysis, recommendations and Agency input to the EPA Indian Work Group's Discussion Paper, *Administration of Environmental Programs on American Indian Reservations* (July 1983).

TIMING AND SCOPE

Because of the importance of the reservation environments, we must begin immediately to incorporate the principles of EPA's Indian Policy into the conduct of our everyday business. Our established operating procedures (including long-range budgetary and operational planning activities) have not consistently focused on the proper role of Tribal Governments or the special legal and political problems of program management on Indian lands. As a result, it will require a phased and sustained effort over time to fully implement the principles of the Policy and to take the steps outlined in this Guidance.

Some Regions and Program Offices have already made individual starts along the lines of the Policy and Guidance. I believe that a clear Agency-wide policy will enable all programs to build on these efforts so that, within the limits of our legal and budgetary constraints, the Agency as a whole can make respectable progress in the next year.

As we begin the first year of operations under the Indian Policy, we cannot expect to solve all of the problems we will face in administering programs under the unique legal and political circumstances presented by Indian reservations. We can, however, concentrate on specific priority problems and issues and proceed to address these systematically and carefully in the first year. With this general emphasis, I believe that we can make respectable progress and establish good precedents for working effectively with Tribes. By working within a manageable scope and pace, we can develop a coordinated base which can be expanded, and, as appropriate, accelerated in the second and third years of operations under the Policy.

In addition to routine application of the Policy and this Guidance in the conduct of our everyday business, the first year's implementation effort will emphasize concentrated work on a discrete number of representative problems through cooperative programs or pilot projects. In the Regions, this effort should include the identification and initiation of work on priority Tribal projects. At Headquarters, it should involve the resolution of the legal, policy and procedural problems which hamper our ability to implement the kinds of projects identified by the Regions.

The Indian Work Group (IWG), which is chaired by the Director of the Office of Federal Activities and composed of representatives of key regional and headquarters offices, will facilitate and coordinate these efforts. The IWG will begin immediately to help identify the specific projects which may be ripe for implementation and the problems needing resolution in the first year.

Because we are starting in "mid-stream," the implementation effort will necessarily require some contribution of personnel time and funds. While no one program will be affected in a major fashion, almost all Agency programs are affected to some degree. I do not expect the investment in projects on Indian Lands to cause any serious restriction in the States' funding support or in their ability to function effectively. To preserve the flexibility of each Region and each program, we have not set a target for allocation of FY 85 funds. I am confident, however, that Regions and program offices can, through readjustment of existing resources, demonstrate significant and credible progress in the implementation of EPA's Policy in the next year.

ACTION

Subject to these constraints, Regions and program managers should now initiate actions to implement the principles of the Indian Policy. The eight categories set forth below will direct our initial implementation activities. Further guidance will be provided by the Assistant Administrator for External Affairs as experience indicates a need for such guidance.

1. THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS WILL SERVE AS LEAD AGENCY CLEARINGHOUSE AND COORDINATOR FOR INDIAN POLICY MATTERS.

This responsibility will include coordinating the development of appropriate Agency guidelines pertaining to Indian issues, the implementation of the Indian Policy and this Guidance. In this effort the Assistant Administrator for External Affairs will rely upon the assistance and support of the EPA Indian Work Group.

2. THE INDIAN WORK GROUP (IWG) WILL ASSIST AND SUPPORT THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS IN DEVELOPING AND RECOMMENDING DETAILED GUIDANCE AS NEEDED ON INDIAN POLICY AND IMPLEMENTATION MATTERS. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD DESIGNATE APPROPRIATE REPRESENTATIVES TO THE INDIAN WORK GROUP AND PROVIDE THEM WITH ADEQUATE TIME AND RESOURCES NEEDED TO CARRY OUT THE IWG'S RESPONSIBILITIES UNDER THE DIRECTION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS.

The Indian Work Group, (IWG) chaired by the Director of the Office of Federal Activities, will be an important entity for consolidating the experience and advice of the key Assistant and Regional Administrators on Indian Policy matters. It will perform the following functions: identify specific legal, policy, and procedural impediments to working directly with Tribes on reservation problems; help develop appropriate guidance for overcoming such impediments; recommend opportunities for implementation of appropriate programs or pilot projects; and perform other services in support of Agency managers in implementing the Indian Policy.

The initial task of the IWG will be to develop recommendations and suggest priorities for specific opportunities for program implementation in the first year of operations under the Indian Policy and this Guidance.

To accomplish this, the General Counsel and each Regional and Assistant Administrator must be actively represented on the IWG by a staff member authorized to speak for his or her office. Further, the designated representative(s) should be afforded the time and resources, including travel, needed to provide significant staff support to the work of the IWG.

3. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD UNDERTAKE ACTIVE OUTREACH AND LIAISON WITH TRIBES, PROVIDING ADEQUATE INFORMATION TO ALLOW THEM TO WORK WITH US IN AN INFORMED WAY.

In the first thirteen years of the Agency's existence, we have worked hard to establish working relationships with State Governments, providing background information and sufficient interpretation and explanations to enable them to work effectively with us in the development of cooperative State programs under our various statutes. In a similar manner, EPA managers should try to establish direct, face-to-face contact (preferably on the reservation) with Tribal Government officials. This liaison is essential to understanding Tribal needs, perspectives and priorities. It will also foster Tribal understanding of EPA's programs and procedures needed to deal effectively with us.

4. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD ALLOCATE RESOURCES TO MEET TRIBAL NEEDS, WITHIN THE CONSTRAINTS IMPOSED BY COMPETING PRIORITIES AND BY OUR LEGAL AUTHORITY.

As Tribes move to assume responsibilities similar to those borne by EPA or State Governments, an appropriate block of funds must be set aside to support reservation abatement, control and compliance activities.

Because we want to begin to implement the Indian Policy now, we cannot wait until FY 87 to formally budget for programs on Indian lands. Accordingly, for many programs, funds for initial Indian projects in FY 85 and FY 86 will need to come from resources currently planned for support to EPA-and State-managed programs meeting similar objectives. As I stated earlier, we do not expect to resolve all problems and address all environmental needs on reservations immediately. However, we can make a significant beginning without unduly restricting our ability to fund ongoing programs.

I am asking each Assistant Administrator and Regional Administrator to take measures within his or her discretion and authority to provide sufficient staff time and grant funds to allow the Agency to initiate projects on Indian lands in FY 85 and FY 86 that will constitute a respectable step towards implementation of the Indian Policy.

5. ASSISTANT AND REGIONAL ADMINISTRATORS, WITH LEGAL SUPPORT PROVIDED BY THE GENERAL COUNSEL, SHOULD ASSIST TRIBAL GOVERNMENTS IN PROGRAM DEVELOPMENT AS THEY HAVE DONE FOR THE STATES.

The Agency has provided extensive staff work and assistance to State Governments over the years in the development of environmental programs and program management capabilities. This assistance has become a routine aspect of Federal/State relations, enabling and expediting the States' assumption of delegable programs under the various EPA statutes. This "front end" investment has promoted cooperation and increased State involvement in the regulatory process.

As the Agency begins to deal with Tribal Governments as partners in reservation environmental programming, we will find a similar need for EPA assistance. Many Regional and program personnel have extensive experience in working with States on program design and development; their expertise should be used to assist Tribal Governments where needed.

6. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD TAKE ACTIVE STEPS TO ALLOW TRIBES TO PROVIDE INFORMED INPUT INTO EPA'S DECISION-MAKING AND PROGRAM MANAGEMENT ACTIVITIES WHICH AFFECT RESERVATION ENVIRONMENTS.

Where EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments. Agency managers should make a special effort to inform Tribes of EPA decisions and activities which can affect their reservations and solicit their input as we have done with State Governments. Where necessary, this should include providing the necessary information, explanation and/or briefings needed to foster the informed participation of Tribal Governments in the Agency's standard-setting and policy-making activities.

7. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD, TO THE MAXIMUM FEASIBLE EXTENT, INCORPORATE TRIBAL CONCERNS, NEEDS AND PREFERENCES INTO EPA'S POLICY DECISIONS AND PROGRAM MANAGEMENT ACTIVITIES AFFECTING RESERVATIONS.

It has been EPA's practice to seek out and accord special consideration to local interests and concerns, within the limits allowed by our statutory mandate and nationally established criteria and standards. Consistent with the Federal and Agency policy to recognize Tribal Governments as the primary voice for expressing public policy on reservations, EPA managers should, within the limits of their flexibility, seek and utilize Tribal input and preferences in those situations where we have traditionally utilized State or local input.

We recognize that conflicts in policy, priority or preference may arise between States and Tribes as it does between neighboring States. As in the case of conflicts between neighboring States, EPA will encourage early communication and cooperation between Tribal and State Governments to avoid and resolve such issues. This is not intended to lend Federal support to any one party in its dealings with the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the interests of both.

Several of the environmental statutes include a conflict resolution mechanism which enables EPA to use its good offices to balance and resolve the conflict. These procedures can be applied to conflicts between Tribal and State Governments that cannot otherwise be resolved. EPA can play a moderating role by following the conflict resolution principles set by the statute, the Federal trust responsibility and the EPA Indian Policy.

8. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD WORK COOPERATIVELY WITH TRIBAL GOVERNMENTS TO ACHIEVE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS, CONSISTENT WITH THE PRINCIPLE OF INDIAN SELF-GOVERNMENT.

The EPA Indian Policy recognizes Tribal Governments as the key governments having responsibility for matters affecting the health and welfare of the Tribe. Accordingly, where tribally owned or managed facilities do not meet Federally established standards, the Agency will endeavor to work with the Tribal leadership to enable the Tribe to achieve compliance. Where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as we do to noncompliance by the private sector off-reservation.

Actions to enable and ensure compliance by Tribal facilities with Federal statutes and regulations include providing consultation and technical support to Tribal leaders and managers concerning the impacts of noncompliance on Tribal health and the reservation environment and steps needed to achieve such compliance. As appropriate, EPA may also develop compliance agreements with Tribal Governments and work cooperatively with other Federal agencies to assist Tribes in meeting Federal standards.

Because of the unique legal and political status of Indian Tribes in the Federal System, direct EPA actions against Tribal facilities through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Regional Administrators proposing to initiate such action should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel. In emergency situations, the Regional Administrator may issue emergency Temporary Restraining Orders, provided that the appropriate procedures set forth in Agency delegations for such actions are followed.

9. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD BEGIN TO FACTOR INDIAN POLICY GOALS INTO THEIR LONG-RANGE PLANNING AND PROGRAM MANAGEMENT ACTIVITIES, INCLUDING BUDGET, OPERATING GUIDANCE, MANAGEMENT ACCOUNTABILITY SYSTEMS AND PERFORMANCE STANDARDS.

In order to carry out the principles of the EPA Indian Policy and work effectively with Tribal Governments on a long-range basis, it will be necessary to institutionalize the Agency's policy goals in the management systems that regulate Agency behavior. Where we have systematically incorporated State needs, concerns and cooperative roles into our budget, Operating Guidance, management accountability systems and performance standards, we must now begin to factor the Agency's Indian Policy goals into these same procedures and activities.

Agency managers should begin to consider Indian reservations and Tribes when conducting routine planning and management activities or carrying out special policy analysis activities. In addition, the IWG, operating under the direction of the Assistant Administrator for External Affairs and with assistance from the Assistant Administrator for Policy, Planning and Evaluation, will identify and recommend specific steps to be taken to ensure that Indian Policy goals are effectively incorporated and institutionalized in the Agency's procedures and operations.

Attachment

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

ATTACHMENT 3

ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL ACTIVITIES ON INDIAN RESERVATIONS: FY 88

Office of External Affairs
Office of Federal Activities
March 1989

ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL ACTIVITIES ON INDIAN RESERVATIONS: FY 88

Introduction 2

Observations 3

Program Highlights 4

Matrix (Funding and Workyears) 6

Program Summaries

- The Office of Air and Radiation 7
- The Office of Water 12
  - CWA Programs 14
  - SDWA Programs-UIC 19
  - SDWA Programs-PWSS 21
  - GW Programs 28
- Office of Pesticides and Toxic Substances 30
- Office of Solid Waste and Emergency Response 33
  - RCRA Programs 35
  - Title III Programs 40
  - CERCLA Programs 41
- Office of Federal Activities 46
- Office of General Counsel 53

Indian Work Group Coordinators 55

Glossary of Acronyms 56

Appendix A - EPA Indian Policy and Implementation Guidance 60

INTRODUCTION

In November 1984, EPA issued an Indian Policy and Implementing Guidance, in which it committed to working with Indian tribes, recognizing that tribal governments are the primary parties for setting standards, making environmental policy decisions, and managing environmental programs on reservations. The Agency further committed to encourage and assist Indian tribes in assuming regulatory and program management responsibilities.

Since the publication of this policy EPA has focused on three major areas: (1) seeking amendments to environmental statutes in order to clarify the role of tribal governments in this area; (2) increasing outreach activities with tribal governments in order to strengthen their understanding of the federal environmental statutes and EPA's understanding of tribal environmental issues; and (3) working to incorporate attention to tribal environmental problems and issues into EPA's broader management structure: operating guidance, program strategies, budget considerations, etc.

We have made progress in these areas, and we expect that future progress will be greater. The number of workyears expended for the implementation of the Indian policy has increased, as it has each of the past several years. Last year's Celtor Chemical Plant Superfund cleanup in Region 9 cost more than $5 million; in the absence of a major Superfund cleanup this year EPA monies spent on Indian lands decreased. However, baseline funding increased, and we anticipate it will continue to do so as EPA media program offices strengthen their commitment of funding and workyears to fulfill the goals of the Agency's Indian policy.

This report is designed to give an overview of Agency efforts to establish environmental regulations on Indian lands. It measures the amount of workyears (the equivalent of one person working full time for a year) and thousands of dollars that EPA headquarters and each region expended on each program (i.e., Clean Air Act, Federal Insecticide, Fungicide and Rodenticide Act) on Indian lands. It is important to note that travel funds and salaries are not included in the funding column or in the matrix page of this report; if they were, the total amount of reported monies would be larger.

OBSERVATIONS

1. In FY 88, EPA expended approximately $6.9 million and 77.7 workyears on environmental activities on Indian lands.

2. The decrease in funding from FY 87's $8.9 million is due to the completion of the $5.1 million Celtor Chemical Plant Superfund clean up on the Hoopa Reservation in California.

3. There has been an increase of 20.6 workyears, up from 57.1 last fiscal year.

4. The greatest increase in funding comes from the OPTS program, which expended nearly $900,000 more than in FY 87. (In FY 87 OPTS was filed under the heading "FIFRA/TSCA".)

5. The greatest increase in workyears appears in the CWA program, which reported 9.5 more workyears than in FY 88. This reflects the activity required for developing the implementing regulations and ensuring that consultation with tribes occurred.

PROGRAM HIGHLIGHTS FOR FY 88

Communications

The Agency has initiated a concerted effort to ensure that tribal governments are kept informed of EPA activities that might affect them. At headquarters, the communciation strategists review communication strategies to determine if tribal governments are appropriately considered. In addition, the tribes now receive copies of the EPA Journal.

Region 5 has conducted a mail survey of the tribes in that region to ascertain what they perceived as their major environmental concerns and needs. A telephone survey of the Indian news media, similar to that of the tribes, also was conducted. In addition, general, program-specific, and youth-oriented information packets were sent out.

A two-day meeting was held in Region 6 between tribal representatives and regional senior management to discuss recent EPA initiatives and tribal concerns.

Office of Air and Radiation

Region 8 provided grants totalling $473,300 to 9 reservations for air monitoring and program development. These reservations will complete emissions inventories and air quality surveys and will continue to develop air quality codes and regulations for each reservation.

OAR has also included Indian tribes in its national survey of indoor radon levels. In Minnesota, 40% of Indian homes surveyed were found to have radon levels that exceeded the national standard.

Office of Water

Region 5 Water Division, in recognizing the importance of effective communication and program implementation on Indian lands, has established a full-time permanent Indian Programs Liaison position. This individual coordinates among tribes and states in Region 5 for both Clean Water Act and Safe Drinking Water Act programs.

Region 9 contracted with a consultant to assist the development of an application from Stewart's Point Rancheria for HUD CDBG funds. The application was accepted and the tribe received $400,000 in grant funds for structural improvements to its water system.

HQ OW published the final Safe Drinking Water Act Indian Lands Regulations. This clears the way for tribes to apply for grants in support of primacy for the public water supply system program and the underground injection control program.

Office of Pesticides and Toxic Substances

In FY 88, the Office of Pesticides and Toxic Substances provided funding for pesticide compliance monitoring on Indian reservations through eight enforcement cooperative agreements awarded by the Region 8, 9 and 10 offices. In addition, EPA awarded grants for 17 new BIA asbestos abatement projects in the northcentral and southwestern United States.

Under the Asbestos Inspection and Management Plan Assistance Program, EPA provided $1,000,000 in financial assistance (in the form of grants) to BIA schools to help defray the cost of complying with the Inspection and Management Plan requirements of AHERA. The grant was awarded directly to BIA, which will develop an award strategy for its schools.

Office of Solid Waste and Emergency Response

Region 6 Superfund staff participated in a public meeting for a United Nuclear site and provided a translator for Navajo citizens impacted by the site. Region 6 staff also worked on the preparatory work to establish a Superfund "state" memorandum of agreement, a pre-remedial cooperative agreement, and a core cooperative agreement with the Navaho Tribe.

OSWER and OFA co-sponsored three Indian outreach meetings in Billings, Albuquerque, and Duluth. Approximately 150 representatives from tribes, IHS, BIA, and FEMA attended. The meetings focused on the major OSWER programs on Indian lands, including RCRA (Subtitles C, D and I), Superfund and Title III of SARA. In addition, OSWER and OFA staff made site visits to Indian reservations.

Office of Federal Activities

A $40,000 grant was given to the National Congress of American Indians (NCAI) for the training of Indian tribes on how to work with EPA. The tribes will be shown how to use the handbook, entitled Environmental Protection in Indian Country: a Handbook for Tribal Leaders and Resource Managers, which was developed by NCAI on a grant from the Ford Foundation. There were training meetings in Albuquerque, Seattle, Oklahoma City, Green Bay and Sioux Falls. Approximately 200 tribal, BIA, and IHS staff were trained.

A NNEPS intern was hired to study solid waste problems and management on Indian lands. A report and set of recommendations on the subject was developed in cooperation with the Office of Solid Waste.

The Senior Environmental Employee (SEE) program initiative to provide technical assistance to tribes was initiated. OFA and the regional Indian coordinators worked together to place the first SEE employees in Regions 5, 7, and 8. These employees will "circuit ride" and provide technical assistance to tribal environmental staff.

FY 88 ENVIRONMENTAL ACTIVITIES ON INDIAN RESERVATIONS

REG	OAR		CWA		SDWA-UIC		SDWA-PWSS		SDWA-GWP		OPTS		RCRA		SARA/CERCLA/TITLE III		OFA		OGC/ORC		TOTAL	
	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY	Exp.	WY
1																		0.1		0.1	0	0.2
2		0.2				0.3	10	0.7							4.9	0.8	40	0.5			54.9	2.5
3																						
4		0.1	534	0.5				0.4										0.1		0.1	534	1.2
5	95.9	0.9	83	2.4	15	0.4	44.6	0.9	25	0.5	39		30	0.6		0.2	112.5	2.9		0.7	445	9.5
6	5	0.1	330	0.5	94.7	19.8	69.5	1.1	20	0.1		0.2		0.1	0.2	0.8	64	1.1		0.5	583.4	24.3
7						0.3	24	1.1									5	0.2			29	1.6
8	552.5	0.7	40	0.1	7.5	0.8	52	0.6	35	0.3	171.5	1.3	32.5	0.7	58	0.9	75	1.2		1	1024	7.6
9	80	0.2		1.9	89	1	135.2	4			223	0.8		0.8	50	1.1	87	1			664.2	10.8
10	54	1.6	1785	0.9		0.1	66	0.6		0.3	18	0.2		1.3		0.1	75	1.6		0.8	1998	7.5
HQ	9			4.7			5	0.5			1114		100	0.4	285	2.3	77.3	3.4		1.2	1590	12.5
TOT	796.4	3.8	2772	11	206.2	22.7	406.3	9.9	80	1.2	1565	2.5	162.5	3.9	398.1	6.2	535.8	12.1	0	4.4	6922.5	77.7

WY = Workyear (Rounded to the nearest 0.1)
Exp. = Expenditure ($1,000)
All figures are rounded to the nearest 0.1 Workyear and the nearest $100.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

THE OFFICE OF AIR AND RADIATION

The Clean Air Act authorizes a nationwide program of planning, regulation, enforcement and research for the control of air pollution. The EPA is responsible for setting national standards and emission limits, conducting research to strengthen the scientific basis for pollution control, and providing technical and financial support to state, tribal and local air pollution control agencies. These agencies have the primary responsibility for the control and prevention of air pollution.

The EPA strategy to meet the requirements of the Act in the 1980s focuses on five major program goals. They are as follows:

- Reduce the risk of exposure to air toxics.
- Achieve National Ambient Air Quality Standards (NAAQSs) set to protect human health.
- Determine the policy alternatives and strategy options available to address emerging issues.
- Increase the capacity and improve the effectiveness of state, tribal and local air quality agencies.
- Develop and support programs to maintain improvements in air quality.

The first three goals are directed at addressing major environmental problems. They are listed in general order of national priority, based on public health risk and feasibility of control. The order of these priorities may vary from area to area depending on the relative health risks presented by local pollution problems. The fourth and fifth goals are more programmatic and cross-cutting in nature.

The national mandate to protect public health and the environment from the adverse effects of radiation is also derived from the Clean Air Act, as well as from several other statutes. There are two major program objectives under the radiation program. They are as follows:

- Reduce risk of exposure to unhealthful levels of radiation
- Maintain comprehensive surveillance and effective emergency response capabilities.

Descriptions of technical and financial assistance programs available from the Office of Air and Radiation as stated in the Office of Management and Budget's 1987 Catalog of Federal Domestic Assistance are:

PROGRAM DESCRIPTION	FINANCIAL	NON-FINANCIAL
66.001 AIR POLLUTION CONTROL-PROGRAM SUPPORT	*	
66.003 AIR POLLUTION CONTROL-MANPOWER TRAINING	*	
66.006 AIR POLLUTION CONTROL-TECHNICAL TRAINING		*

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF AIR AND RADIATION

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 2		0.2	Outreach	Seneca Nation is routinely sent copies of all informative material, that is also sent to states, concerning radon. Additionally, the region has begun to explore the possibility of entering into an agreement with HUD to address radon corrective measures.
Region 4		0.05	D/I	Advise and provide information on radon testing to tribes.
Region 5	$21.9	0.15	D/I	Twenty-four hundred charcoal canisters and technical assistance were provided for a radon survey on 29 Indian reservations. In addition, coordination of HQ's random radon survey was provided.
		0.05	T/A	Technical assistance and guidance were provided to Region 5 Indian Coordinator on radon issues.
	$61.5	0.35	F/A	The Air Assistance Award provided to the White Earth Reservation is for a program to assess air quality levels. Also support is provided for monitoring acid precipitation, wood burning and to analyze filters for heavy metals and pesticides.
	$12.5 (see HQ)	0.25	F/A	An Air Assistance Agreement to be awarded this year to the Oneida, Menominee, Stockbridge-Munsee Tribes, in consortium, for an air monitoring program to assess air quality particulate levels, pesticides, heavy metals, and SO_2.
		0.05	T/A	Technical assistance and guidance to Region 5 Indian coordinator for air grant related issues.
Region 6	$5.0		F/A	Region 6 contribution to Navajo air grant which is being managed by Region 9.
		0.04	T/A	Evaluation of air grant application from Jicarilla Apache Tribe and meeting with tribal representatives to discuss application and funding considerations.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF AIR AND RADIATION

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 6 (Con't)		0.04	T/A	Coordination of radon survey for Navajo and Indian lands located in New Mexico.
Region 8	$452.8	0.50	F/A	Provide grants to 10 reservations to complete emissions inventories and air quality climatology and to progress toward the development of air quality codes and regulations for each reservation.
		0.10	T/A	Region 8 Air Programs Officer provides training in handling and interpreting air quality data. Also coordinates presentations of special efforts and projects occurring on reservations. Tribal air quality personnel are brought into the regional offices in Denver.
		0.10	T/A	PSD permit applicability determination and modeling/monitoring assessment in instances of a proposal to locate a stationary source on reservation land under federal permitting authority.
	$55.0		T/A	Air quality monitoring assistance by the State of Montana including equipment servicing and location selection. Coordination between reservations and state program activities. This assistance is available to all Montana tribes receiving air quality monitoring grants.
	$44.7		T/A	The Council of Energy Resource Tribes (CERT) provides technical assistance in developing tribal air quality codes and regulations for non-Montana tribes receiving CAA section 105 grants. Early stages of regulation development include CERT's efforts to coordinate the air quality interests of each tribe and the appropriate state air officials.
Region 9	$80.0	0.20	F/A	Navajo Air Quality Project to develop tribal air program.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF AIR AND RADIATION

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 10	$54.0 (see HQ)	1.25	T/A	Program grant to Shoshone-Bannock Tribe.
		0.10	D/I	Oversight of program grant to Shoshone-Bannock Tribe.
		0.02	D/I	Inspect plywood mill on Warm Springs Reservation and recommend improvements to air pollution control facilities.
		0.06	D/I	Processing Spokane Tribe PSD redesignation to Class I status.
		0.02	D/I	Working to achieve compliance of plywood mill on Warm Springs Reservation with air emissions targets.
		0.10	Outreach	Provide information to tribes regarding EPA air programs and funding.
		0.08	D/I	Assist Tulalip Tribe on PSD permit for proposed municipal incinerator on reservation.
HQ ORP -Radon	$9.0		F/A	Headquarters provided 1000 of some 3400 testing kits used in Region 5's Indian lands radon survey.
			T/A	Headquarters provided technical assistance to Indian tribes in Region 5 on radon assessment.
HQ New Tribal Initiatives			F/A	Headquarters funded two new tribal initiatives in Regions 5 and 10 at $70.0 (See regional activities).

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

THE OFFICE OF WATER

The EPA together with state, tribal and local governments has responsibility for water quality in three areas. The first is reducing pollution of surface waters. The second is preventing contamination of groundwaters needed for human consumption. The final area concerns maintaining the purity of drinking water. EPA, states and tribes also implement programs to protect general ground water quality authorized under several different statutes and described in the recently published groundwater strategy.

Authority to implement these programs comes from three major statutes. They are as follows:

- Safe Drinking Water Act (SDWA)
- Clean Water Act (CWA)
- Marine Protection, Research, and Sanctuaries Act (MPRSA)

Objectives of the major statutes are:

SDWA

Ensure that drinking waters are free from harmful contaminants, protect groundwater from contamination by underground injection, and support state groundwater quality management initiatives.

CWA

Restore and maintain the chemical, physical, and biological integrity of the Nation's water.

MPRSA

Provide for the safe and effective disposal of dredged materials, sewage sludge, hazardous waste, and other materials at sea. (This statute does not directly relate to American Indian tribes or tribal governmental authorities.)

The Groundwater Protection Strategy, though not a statute, supports states in the development and implementation of groundwater protection programs. It also provides a common policy basis for all EPA Groundwater Program activities.

The Safe Drinking Water Act establishes four programs through which the EPA can fulfill its mandate of ensuring that drinking waters are free from harmful contaminants. The first one is the Public Water Supply Supervision Program. This program focuses on providing safe drinking water to users of public water systems, and it is currently the most active program on Indian reservations. The Underground Injection Control Program (UIC) focuses on protection from contamination of groundwater supplies that are or might be sources of drinking water due to the subsurface placement of fluids by well operators. The 1986 Amendments to the Safe Drinking Water Act created additional groundwater protection programs. The first, the Sole Source Aquifer Demonstration Program (SSAD), provides funds to state, tribal or local political units to demonstrate unique groundwater protection activities. The second, the

Wellhead Protection Program (WHP), provides funds to states and tribes to protect the area around the public drinking water wells or wellfields. It should be noted, however, that Congress did not appropriate funds for these programs in FY 1988.

The Clean Water Act provides a comprehensive structure for water pollution control. The Act provides for establishment of technology-based and water quality-based controls for sources of pollutants, state and now tribal water quality standards to protect water uses, monitoring to assess water conditions and trends, and water quality management (WQM) planning to analyze problems and design needed control measures. The Act accomplishes its purpose by creating a partnership between EPA and the governments of the various states and tribes. The Act allows for state and tribal government (under certain circumstances) to develop water quality standards. In addition, the Act creates specific programs to assist states and tribes in funding pollution control activities in the areas of wastewater treatment, clean lakes restoration, and non-point source pollution abatement.

Descriptions of technical and financial assistance programs available from the Office of Water as stated in the Office of Management and Budget's 1987 Catalog of Federal Domestic Assistance are:

PROGRAM DESCRIPTION	FINANCIAL	NON-FINANCIAL
66.418 CONSTRUCTION GRANTS FOR WASTEWATER TREATMENT WORKS	*	
66.432 STATE PUBLIC WATER SYSTEM SUPERVISION	*	
66.433 STATE UNDERGROUND WATER SOURCE PROTECTION	*	
66.438 CONSTRUCTION MANAGEMENT ASSISTANCE	*	
66.454 WATER QUALITY MANAGEMENT PLANNING	*	

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER CLEAN WATER ACT PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 1		0.02	T/A	Reviewed potential impact of adjacent development on Narragansett Tribe's Aquifer.
			F/A	With IHS, submitted the Passamaquaddy Tribe as a candidate for funding as a model project under the Wastewater Treatment Indian Set-Aside Program.
Region 4		0.30	D/I	Visited each reservation and inspected wastewater treatment facilities, issued NPDES permits, and monitored compliance with respective NPDES permit limitations on discharges.
		0.15	T/A	Stream studies for establishing WQS stream standards and compliance activities.
		0.05	D/I	Assist tribes in obtaining grants and obtain delegation of CWA.
	$534.0		D/I	A wastewater treatment Indian set-aside model project grant was awarded to the Eastern Band of Cherokee Indians.
Region 5	$52.2	0.50	D/I	Five biological surveys at four reservations to assess ambient water quality using fish and benthic macroinvertebrate rapid assessment techniques. This phase was initiated to document baseline information from known or suspected point and non-point source influences.
		0.25	Outreach	Water Division's Indian Programs Coordinator conducted 27 site visits and met with tribal chairmen and/or tribal representatives from all 29 reservations to discuss various aspects of CWA and SDWA programs as they apply to Indian lands. Specific tribal issues/concerns were distributed to Water Division staff for appropriate follow-up.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER CLEAN WATER ACT PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5 (Con't)		0.05	Outreach	Water Division coordinated a meeting between Minnesota Pollution Control Agency and the various tribes in Minnesota. The purpose of the meeting was to have state and tribes discuss their respective programs, and identify areas of mutual interest. It is felt that this type of meeting will foster more positive and productive state/tribal relations. Similar meetings are planned for Wisconsin and Michigan.
	$30.0	0.50	T/A	Grant to a non-profit organization to fund a circuit rider half-time to visit all reservations and provide technical advice/assistance relative to CWA programs. In addition, a slide presentation is to be developed to be used in sensitizing division staff to tribal concerns, customs, and traditions. Workshops on small rural wastewater treatment issues are also planned.
		0.01	D/I	Three NPDES permits were issued to Indian tribes.
		0.15	T/A	Representatives are visiting all reservations to assess needs for NPDES permits. All sewage lagoon systems discharging to surface waters are to be issued permits.
		0.10	D/I	An inventory of discharge permits issued has been compiled. The permits are being reviewed for compliance. Violations will be followed.
		0.02	T/A	Section 314, Clean Lakes Grant, Phase 1 diagnostic feasibility study. Provides for research to gather data on 4 tribal lakes and their watersheds and development of management plans for each lake. Effort continued from FY 87.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER CLEAN WATER ACT PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5 (Con't)	$0.8	0.03	T/A	Regional contract funds ($750) awarded to consultant to assist MN Chippewa Tribe with the preparation of Section 314 Clean Lakes diagnostic feasibility study for 4 tribal lakes .
		0.10	Outreach	Advised tribes on the availability of resource information including Nat'l Small Flows Clearinghouse.
				Provided regional and state outreach contacts to tribes.
				Provided information on water conservation and flow reduction to circuit rider for distribution to tribes.
		0.70	D/I	Identification and recommendation of candidates for funding as model projects under the Wastewater Treatment Indian Set-Aside Program. Also aided workgroup in establishing procedures and criteria for set-aside grants.
Region 6		0.50	D/I	Issuance of NPDES permits involving Indian reservations and/or issues.
			Outreach	Met with representatives of the Cherokee Nation to discuss EPA funding sources for building wastewater treatment facilities.
	$330.0	0.02	F/A	The Isleta Pueblo was selected for funding as a model project under the wastewater treatment Indian Set-Aside Program.
		0.01	T/A	Meeting with Navajo Tribe to discuss improvements to Shiprock STP to meet permit limits.
		0.01	Outreach	Advise Navajos on delegation of NPDES Permit/Enforcement Program.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER CLEAN WATER ACT PROGRAMS

HEADING	FUNDING	YEARS	TYPE	DESCRIPTION
Region 8	$40.0		T/A	Conducted onsite evaluations of treatment plants through 104(g)(1) program.
		0.05	T/A	Provided O&M review & T/A for St. Stevens School review for NPDES violations.
		0.05	Outreach	Met with a number of tribes on construction grant needs.
Region 9		0.08	D/I	NPDES inspection and enforcement activities on Indian reservations.
		0.15	D/I	NPDES permit issuance on Indian lands: * reissuance of permit to Chinle * new permits to Kinlinchee and UMTRA
		0.60	T/A D/I Outreach	Provide information and technical assistance to tribes on CWA amendments. Work with tribes to implement CWA programs.
		1.0	D/I	Region 9 heading up coordination effort with Pyramid Lake-Paiute Tribe/NV Department of Environmental Protection and the Cities of Reno and Sparks to resolve current litigation over water quality in the Truckee River.
		0.15	F/A D/I	The White Mtn. Apache Tribe is to receive $150.0 in FY 89 under the model projects for the Construction Grants Indian Set-aside. EPA & IHS began work with the tribe to develop an interagency agreement.
Region 10		0.03	D/I	Assist Colville Confederated Tribes in promulgation of tribal water quality standards.
		0.02	Outreach	Keep Columbia River Inter-tribal Fish Commission informed of state water quality standards.
		0.02	Outreach	Inform tribes of water quality standard developments and issues and section 106 grant funding issues.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER CLEAN WATER ACT PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 10 (Con't)		0.01	D/I	Negotiation of work plans for section 106 grant proposals (pre-award).
		0.02	T/A	Field/lab support to tribes for surface water chemical and biological assessments.
		0.05	Outreach	Inform tribes of municipal facility funding sources. Forward comments and information on needs to EPA-HQ.
		0.20	T/A	NPDES program work for Colville reservation permittees.
		0.01	T/A	Follow-up with the Confederated Tribes of Warm Springs Reservation to discuss NPDES requirements for tribal wastewater treatment.
		0.05	D/I	Working on NPDES permit for forest products mill on Warm Springs Reservation.
		0.02	D/I	Compliance inspection of Warm Springs Forest Products, Inc.
		0.03	D/I	Negotiation of workplans for sect. 106 proposals (pre-award).
		0.20	D/I	Model construction grant project to Tulalip Tribe (FY 89 grant award)
	$1,785		F/A	Construction grant to the Swinomish Tribe.
		0.20	Outreach	Work on cooperative agreements with Puyallup and Swinomish Tribes.
HQ		4.70	D/I Outreach	Development of CWA Indian regulations, the wastewater treatment needs Report to Congress, work towards promulgation of WQS for the Colville Reservation, and general outreach.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - UIC

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 2		0.10	D/I	Administration of a UIC program for the Seneca Nation.
		0.10	T/A	Technical assistance for inspection of Class II wells on Seneca Nation Reservation.
		0.10	Outreach	Correspondence and meetings with the Seneca Nation and the St. Regis Mohawk Tribe regarding delegation of UIC program.
Region 5	$15.0	0.25	D/I	Project grant fund, in the form of an IAG with Indian Health Service, to assist in direct implementation by providing an inventory of UIC wells emphasizing Class V.
		0.10	T/A	Region 5 staff will provide training on injection wells to IHS field personnel and specific tribal staff.
Region 6		0.20	D/I	Co-lead activities for UIC on Indian lands; counsel water program at meetings with tribal representatives in the field and at Region 6.
		0.50	Outreach T/A	Region 6 has developed tailored Indian regulations for the remaining OK and NM Indian lands, including all Ute, Mountain Ute and Navajo lands. The region has coordinated extensively via meetings and hearings with tribes, other regions and agencies the development and implementation of the programs. Have also participated on OW-Indian Workgroup and reviewed, commented and participated in meetings regarding Indian Primacy Regulations.
	$94.7	19.0	D/I	Continue to administer UIC Program for Osage Mineral Reserve in Osage County, OK for approximately 4,000 Class II wells utilizing a field office in Pawhuska, OK, along with regional staff and a cooperative agreement/grant with the Osage .

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - UIC

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 6 (Con't)		0.10	T/A	Federal assistance to the Navajo Tribe for a UIC project involving identification of wells and USDWs. ($74.3K transferred from Region 9.)
Region 7		0.25	D/I	Staff to review proposed regulations for UIC activities on Indian lands.
Region 8	$2.0	0.15	D/I	Continued direct implementation and aquifer protection activities in Montana and Colorado on Indian lands.
	$1.0	0.05	T/A	T/A to HQ Indian workgroup developing primacy guidance package. Assistance and participation in Regional Indian Workgroup. Minimal T/A provided to Indian tribes. Major assistance provided to well operators to help protect tribal aquifers.
	$0.5	0.05	Outreach	Presentation to Southern Ute tribal council on proposed Indian primacy regulations. Continued discussions with Wind River Tribes regarding primacy.
	$4.0	0.50	D/I	Coordinate with regions and tribes on Navajo and Ute Mountain on program development. This is a current major work effort.
		0.05	D/I	Developing a strategy to identify and set priorities for Class 5 wells on Region 8 Indian lands.
Region 9	$89.0	1.0	D/I	Review of surrounding states' and Navajo Nation's UIC files. Conduct field inspections for wells targeted for priority attention. Data obtained from inventory will be added to the database.
Region 10		0.1	D/I	Assist HQ to finish rulemaking for UIC. Advise tribes on primacy. Work with Colville Tribes on inventory of wells.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - PWSS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 2	**$10.0**	0.10	T/A	**Through grant money from the ODW, Region 2 has provided funds for PWSS monitoring, testing and training of tribal staff from the Seneca and St. Regis Mohawk Nations.**
		0.30	T/A	Direct technical assistance to the two tribes on their Public Water Supply (PWS).
		0.30	D/I	Administration for primacy of the new Indian amendments of the SDWA for the two tribes.
Region 4		0.40	D/I	Sanitary surveys of all drinking water systems on reservations and took appropriate enforcement actions. Prepared to sample VOCs in these systems, including vulnerability assessments. Attended IHS area office seminar and Miccosukee Health Fair to present information about drinking water.
Region 5		0.25	D/I	Sanitary surveys are conducted at public water supply systems by Region 5 staff and the MRWA Circuit Rider. Radiological and inorganic chemicals are collected.
	$5.0		D/I	Contract labs to analyze samples from the sanitary surveys. Additionally, 51 PWSSs have been targeted for Radium 226-228 analyses. Results available in the 4th QTR. FY 89.
	$37.5	0.50	T/A	Direct technical assistance to 29 reservations. Grant to MRWA. Circuit Rider is provided as is technical assistance related to operation and maintenance of community systems.
	$1.5	0.02	Outreach	Outreach activities include the publication of Community Water Systems O&M Serviceline and organization of Safe Drinking Water Act workshops.
		0.10	D/I	Provide assistance to tribes allowing them to meet the lead public notice requirements. Correspondence, phone contact and news media outreach activities.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - PWSS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5 (Con't)		0.02	Outreach	Representative spent 2.5 weeks at HQ finalizing PWS/UIC primacy regulation on Indian lands.
	$0.6	0.01	T/A	Quality Assurance Section provided T/A to the Minnesota Chippewa Tribe in developing its laboratory capability to meet EPA certification for nitrates and microbiological analyses.
Region 6	$19.5	0.50	D/I	Implementation of drinking water regulations on Apache and Pueblo lands in New Mexico. Funding is for laboratory analysis of samples required by SDWA. Workyears are expended on compliance activities.
	$33.0	0.20	D/I	Volatile organic chemical (VOC) survey of all Apache and Pueblo public water supply wells in New Mexico. (Technical Support Division supplied laboratory resources.)
		0.10	Outreach	Assistance provided as part of EPA participation in Indian training sessions (update of EPA regs, other technical information.)
	$17.0	0.20	T/A	Through an interagency agreement with IHS, training is provided for water operators to ensure compliance with SDWA. Assistance is also provided to help tribes form utility authorities that will develop ordinances, fee systems, and to help tribes cope with operator turnover situations.
		0.10	T/A	Assistance provided to tribes for issuance of lead public notice required by SDWA Amendments.
Region 7	$8.3	0.20	T/A	Interagency Agreement (IAG) with Indian Health Service Aberdeen Area (IHS). IHS/EPA will jointly sponsor advanced operator training and basic on-site operator training.
	$1.2	0.20	T/A	IAG with IHS to jointly sponsor the second year of a water distribution pilot study on the Winnebago Reservation.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - PWSS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 7 (Con't)	$3.5	0.20	T/A	IAG with IHS and Region 7 EPA to sponsor a lead detection program on Indian Lands; a VOC sampling program, and produce a videotape on public notification.
	$4.0	0.25	D/I	Indian Lands Coordinator will visit tribal PWSs and discuss compliance with the SDWA, perform inspections, and meet with IHS and BIA staffs and attend Indian workgroup meetings.
	$7.0	0.15	T/A	Grants to Iowa Rural Water Assn., Kansas Dept. of Health and Environment, and Nebraska Dept. of Health to provide T/A to tribal PWS operators, data input assistance to the region, and assist in sanitary surveys, etc.
		0.05	D/I	EPA staff perform sanitary surveys on Indian lands in Region 7 to document facility conditions, discover technical assistance needs and to update inventories.
Region 8	$35.0		T/A	O&M training for Indian water system operators through the AWWA of South Dakota using a trainer to travel to the reservations to give hands-on training. Indian utility personnel and IHS have expressed appreciation for this trainer and his assistance.
	$5.0		T/A	Continue SDWA training to tribal council members and utility managers through IAG with IHS.
		0.50	D/I	Direct implementation activities including tracking and monitoring of and compliance by water systems with national drinking water regulations and some technical assistance and sanitary surveys. There has been little enforcement activity to date.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - PWSS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 8 (Con't)	$10.0		T/A	Year-end grant to Linn-Benton Community College to provide training for MT and WY tribes. Training will address efficient operation of drinking water facilities and operator certification. Training coordinated with IHS.
	$2.0		T/A	Year-end grant to Colorado Rural Water Association to provide O&M training to Colorado tribes.
		0.05	D/I	EPA staff performed sanitary surveys on Indian lands in Region 8 to document facility conditions, discover technical assistance needs and to update inventories.
Region 9	$ 15.0		T/A	Grant to Tohono O'Odham for costs associated with tribal assistance to EPA in implementing portions of the PWSS program. Tribal assistance consists mainly of field surveys and case-by-case follow-up of reported violations.
	$50.0		T/A	Grant to Navajo Tribe for costs associated with tribal assistance to EPA in implementing portions of the PWSS program. Tribal assistance consists mainly of field surveys, case-by-case follow-up on reported violations and system visits to promote O&M.
			T/A	Continuation of an IAG with the Tuscon area IHS to fund water system operator training programs and to prepare site-specific O&M manuals. (Funded in FY 87, but the project continues in FY 88 with no additional funding.)
			D/I	Region 9 staff perform sanitary surveys in NV, AZ, CA, and on the Navajo reservation (AZ, NM, and UT). These surveys are in addition to those done by IHS.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - PWSS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 9 (Con't)	$10.0		T/A	Grant to SCTCA for training in efficient operation of tribal utility. Course materials will be a training module developed with EPA funding. After the course, SCTCA will work with 6 tribes to form an O&M utility district to handle the O&M and administrative needs of the tribes' water systems.
	$20.0		T/A	Continuation of an IAG with the Pheonix area IHS to fund training programs for water system operators and utility organizations on reservations in NV and AZ. This training will include both full courses and workshops on specific subjects.
			T/A	Region 9 Indian Lands PWSS Team is continuing to provide T/A in a special project on the Colorado River Indian Tribes' reservation in Arizona, addressing pesticide contamination of groundwater.
			D/I	Logging and tracking results of monitoring reports from some 450 PWSSs located on Region 9 Indian lands. This data is used to determine compliance, write annual reports, send out monthly summaries to IHS, inform operators of violations, and follow up with necessary enforcement action including posting public notice and issuing of emergency administrative orders when necessary.
			T/A	Continuation of IAG with Navajo area of IHS to produce system specific O&M manuals. (This was funded in FY 87-$45K).
	$10.0		T/A	Continue IAG with IHS California Area Office to conduct operator training courses in California.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - PWSS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 9 (Con't)	$3.5		T/A	Contract with consultant to assist the development of an application to HUD for CDBG funds. Resulted in Stewart's Point Rancheria receiving $400K in grant funds for structural improvements to water system.
			T/A	Work with county board of supervisors to include Indian water system project in its request for CDBG funds.
	$6.5		T/A	IAG with California IHS Area Office for the development of as-built drawings for water systems that will be part of the reservation utility district in Southern California.
			T/A	Developed agreement with HUD whereby EPA concurrence must be obtained before awarding CDBG funds for water system projects.
	$0.2		T/A	Developed flier that tribes used to meet the lead public notice requirements. 3,500 notices were distributed in California.
			T/A	Compliance certificates issued to those systems which met all of the bacteriological sampling and MCL requirements for the year.
	$20.0		T/A	IAG with California IHS Area Office to fund a position for an O&M coordinator, who will assist in the development and implementation of training programs for water system operators in California.
			T/A	Continuation of an IAG with the California IHS Area Office for an O&M advocate position. This person travels to the widely scattered and remote rancherias and reservations of Northern California to train operators at their water systems. This technician has been very well received thus far. In FY 88 the IHS picked up salary costs for the technician.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER SAFE DRINKING WATER PROGRAMS - PWSS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 9 (Con't)		4.0 (For all PWSS projects noted)	D/I	Direct implementation of SDWA on Indian lands including administration of grants, lab support, and supervision.
Region 10	$26.0		T/A	IAG with IHS to provide sanitary surveys and operator training.
	$1.0		T/A	Shipping costs for water samples.
		0.50	D/I	PWSS supervision and sampling PWSSs for inorganics.
		0.02	Outreach	Determine status/needs of Kalispell PWSS.
	$39.0	0.01	T/A	Determine training needs and develop Indian operator training program with IHS.
		0.03	Outreach	Assist in developing Indian primacy regulations.
HQ	$5.0	0.50	Outreach	Development of regulations to treat Indian tribes as states; provide financial assistance to eligible Indian tribes; primacy for Indian tribes.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER GROUND WATER PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5	$25.0	0.50	T/A	Completed Vulnerability Assessment June 1, 1988. Assessment includes: * Potential contamination source inventory. * Well logs, and * Tribal program assessment. This information was collected for all PWS well fields. It will be used to rank tribes for future Wellhead funding and assistance.
		0.01	T/A	Reviewed SSA petition for completeness. Conference call with tribe to discuss need for additional informantion. Coordinated with USGS in MN to supply hydrogeologic information.
Region 6		0.05	Outreach	Advise tribes/pueblos of the EPA Groundwater Protection Strategy, the Sole Source Aquifer programs, the Wellhead Protection program, and that groundwater protection is an eligible activity for CWA Section 106 Water Pollution Grants.
	$20.0	0.05	F/A	Investigating the potential for a pilot Wellhead Protection program on Indian lands.
Region 8	$35.0	0.30	F/A	Grant to the Turtle Mountain Reservation to build a technically sound, risk-based environmental information system to use for developing priorities for pollution reduction and prevention. (Funding provided by HQ Office of Policy, Planning and Evaluation).
			T/A	T/A through CERT technical assistance contract for drilling monitoring wells. Region 8 provided well sampling analysis as well as oversight. ($10K reported in FY 87, actual work occurred in FY 88.)
Region 10		0.15	Outreach	Advise tribes on Sole Source Aquifer/ Wellhead Protection Programs and general ground-water issues.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF WATER GROUND WATER PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 10 (Con't)		0.02	T/A	Technical assistance to the Spokane Tribe for the Dawn Mine Mill Site.
		0.10	D/I	Meetings with Tulalip Tribe concerning the Tulalip Sole Source Aquifer.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

THE OFFICE OF PESTICIDES AND TOXIC SUBSTANCES

The basic authorities for the Pesticides and Toxic Substances Control Programs are the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Federal Food, Drug and Cosmetic Act (FFDCA), the Toxic Substances Control Act (TSCA), the Asbestos Hazard Emergency Response Act (AHERA), the Asbestos Schools Hazard Abatement Act (ASHAA), and the Superfund Amendments and Reauthorization Act (SARA).

Each statute recognizes the need for protecting human health and the environment from harmful chemicals.

Toxic substances programs under ASHAA and AHERA focus on the elimination of asbestos in schools and public buildings as an existing chemical risk/hazard while other potential risks from new and existing chemicals are identified, assessed, and managed under TSCA and sections of SARA. This broad coverage enables EPA to take a variety of regulatory actions which impact on the manufacture, distribution in commerce, processing, use, or disposal of chemical substances for the public good. To date, the states and EPA have collectively focused on achieving environmental results through federal assistance (e.g., asbestos abatement grants) and outreach (e.g., training, seminars, etc.).

Description of technical and financial assistance programs available from the Office of Pesticides and Toxic Substances as stated in the Office of Management and Budget's 1987 Catalog of Federal Domestic Assistance are:

PROGRAM DESCRIPTION	FINANCIAL	NON-FINANCIAL
66.700 PESTICIDES ENFORCEMENT PROGRAM	*	
66.702 ASBESTOS HAZARDS ABATEMENT (SCHOOLS) ASSISTANCE	*	

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF PESTICIDES AND TOXIC SUBSTANCES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5	$39.0		F/A	Asbestos abatement of pipe and boiler wrap in school buildings. (Oneida and Mille Lac Band of Chippewa.)
			Outreach T/A	School asbestos inspection, assessment and management of buildings. (AHERA regulations for schools.)
Region 6		0.20	T/A	Coordination and oversight of grant awarded by HQ to BIA to administer and subsidize the asbestos inspection and management plan development program under AHERA for all Indian schools in the U.S.
Region 8	$171.5		F/A	There are five Pesticide Cooperative Enforcement Agreements active in the region with the Cheyenne River, Lower Brule, Pine Ridge Oglala and Rosebud Sioux Tribes and Three Affiliated Tribes at Ft. Berthold. They provide for pesticide enforcement of FIFRA and tribal pesticide ordinances.
		0.20	T/A	Inspector training, program information, joint enforcement if requested.
		0.30	T/A	Program oversight, pesticide use, and technical assistance. Efforts are underway to achieve tribal/state/EPA coordination. Enforcement training involves pesticide problem identification.
		0.83	D/I	Pesticide enforcement on several reservations.
Region 9	$63.0	0.25	F/A	Grant to Navajo Nation to enable the tribe to enforce FIFRA and conduct a pesticide outreach program on the reservation.
	$160.0	0.50	F/A T/A	Grant to Inter-Tribal Council of Arizona on pesticide issues including enforcement of FIFRA and tribal pesticide ordinances, and to provide technical assistance. Tribes which are included in this effort are Gila River, Cocopah, Quechan, Colorado River, Salt River-Pima Maricopa, Ft. Mohave, Ak-Chin and Tohono O'Odham.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF PESTICIDES AND TOXIC SUBSTANCES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 10	$18.0		F/A	Pesticide enforcement grant to Shoshone-Bannock Tribes to assist in development of pesticide use and certification code, and training of a tribal inspector.
		0.20	D/I	Working with Shoshone-Bannock Tribes in pesticides enforcement, code develpment, training, disposal policies, safety programs, and in develpment of IAG
HQ-ASHAA *Region 6 *Region 7 *Region 8	$113.7 $40.878 $33.097 $39.777		F/A	Under the ASHAA, the EPA provides financial assistance in the form of grants to BIA schools for abatement of asbestos hazards in school buildings. In FY 88, EPA offered grants for 17 new BIA asbestos abatement projects in the north-central and southwestern United States.
			Outreach	HQ personnel met with BIA officials regarding the ASHAA loan and grant program and assisted the Bureau in updating their applications.
HQ-AIMPAP	$1000.0		F/A	Under the Asbestos Inspection and Management Plan Assistance Program, EPA provides financial assistance (in the form of grants) to BIA schools to help defray the cost of complying with the Inspection and Management Plan requirements of AHERA. The grant was awarded directly to BIA, which will develop an award strategy for their schools.
			Outreach	HQ personnel met with BIA officials to discuss the application requirements. HQ and regional personnel worked directly with BIA to ensure that all selection criteria were addressed.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

THE OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

The programs administered by the Office of Solid Waste and Emergency Response (OSWER) are authorized by the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA); and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

EPA's goal in these areas is to protect human health and the environment by addressing hazardous substance emergencies and to address uncontrolled hazardous waste sites; to ensure proper ongoing management and closure of solid and hazardous waste facilities; to prevent leaks from underground storage tanks and to conduct corrective actions for leaks that threaten human health and the environment; and to promote community awareness of chemical hazards and to develop state and local capabilities for preventing and responding to chemical accidents and emergencies.

In FY 1988, the Office of Solid Waste's (OSW) greatest challenge in implementing the EPA Indian Policy has involved developing a policy on implementation of the Subtitle D Solid Waste Management Program on Indian lands. Toward this end, OSW has been working with the Office of Federal Activities (OFA) and the Office of General Counsel (OGC) to develop a policy regarding implementation of the Solid Waste Management program on Indian lands. OSW is working with OFA to create a paper outlining the issues and making recommendations for solutions.

OSW has also included recommendations regarding solid waste management on Indian lands in its Report to Congress on Subtitle D. Recommendations included: (1) a change to the statutory definition of Indian tribes, currently included under the municipality definition, to treat tribes as states similar to the way tribes are treated under the Safe Drinking Water Act, and (2) encouragement of greater communication and coordination among the EPA, the Indian Health Service (IHS), the Bureau of Indian Affairs (BIA), and the Department of Housing and Urban Development (HUD). OSW is working with OFA, IHS, BIA and HUD to develop an Interagency Agreement regarding respective roles and funding to implement solid waste management on Indian lands.

The Office of Underground Storage Tanks (UST) has developed the UST Program Indian Lands Strategy for FY 1988 and FY 1989 and Guidance for Regional Pilot Projects. The focus of this strategy is to assess the extent of UST-related human health and environmental problems on Indian lands by conducting pilot projects in Regions 8 and 9. The objectives of the pilot projects are to maximize the involvement of tribes in all activities; to provide compliance assistance, education, and outreach to owners and operators of UST systems on Indian lands; to assess the extent of the problem (i.e., data collection on number, location, and types of UST systems); to identify opportunities for Indian-run regulatory and response programs; to identify potential problems (i.e., leaking and abandoned USTs); to oversee responsible party financed response; and to promote the involvement of other agencies and organizations.

In implementing the CERCLA program on Indian lands, EPA will continue into FY 1989 and beyond a program of interacting with tribes. A program of informing tribes about how to have hazardous waste sites included on the CERCLIS survey has already been initiated. This program will increase in activity in FY 1988. In addition, OSWER staff began the process of developing guidelines for implementing SARA Title III on Indian reservations. These guidelines assess hazardous materials emergency response planning on reservation lands.

Descriptions of technical and financial assistance programs available from the Office of Solid Waste and Emergency Response as stated in the Office of Management and Budget's 1987 Catalog of Domestic Assistance are:

PROGRAM DESCRIPTION	FINANCIAL	NON-FINANCIAL
66.801 HAZARDOUS WASTE MANAGEMENT STATE PROGRAM SUPPORT	*	
66.802 HAZARDOUS SUBSTANCE RESPONSE TRUST FUND	*	
66.805 UNDERGROUND STORAGE TANKS PROGRAM	*	*

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE RCRA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5		0.20	T/A F/A	Menominee Pilot Project. Developed solid waste rules and groundwater rules. Tribe continues to develop surface water rules. Revised hazardous waste rules to allow for sitting TSDs and to be more consistent with state regulations. A grant was given to the Menominee Tribe (FY 88 with carry-over from FY 87) for implementation activities for new rules.
	$30.0	0.20	D/I	OSW funds for CERT T/A to develop three generic solid waste plans (one each for tribes within MI, MN, and WS). Each plan will be unique and reflect the trends in solid waste management for each state, to facilitate tribal/state coordination.
		0.10	T/A	A training plan is being developed by the University of Wisconsin-Extension to provide the tribes with information on solid waste management. It will be provided to tribal representatives and IHS personnel and will cover basic solid waste issues, alternatives, decision making, and regulatory development. Training would be in late FY 88 or early FY 89 (Oct).
		0.05	F/A	Funds are being sought to provide demonstration grants on reservations. Three areas are being investigated for potential funding. The Winnebago Tribe is proposing to establish a prepaid waste disposal system. The Flambeau Tribe proposal is for a transfer station. The Stockbridge/Munsee Tribe is seeking funding to establish several collection points for waste disposal. The tribe has entered into a cooperative agreement with the counties for disposal at a regional landfill. These demonstration grants would be funded by all agencies in the 5-agency MOU, in a cooperative effort.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE RCRA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5 (Con't)				An MOU among USEPA, BIA, IHS, HUD, and USGS was signed by all agencies to promote interagency cooperation in developing environmental protection on Indian lands.
Region 6		0.01	Outreach	Presented speech and gave handouts to Indian tribal representatives on the new municipal solid waste landfill criteria under the Agency's Subtitle D initiative.
		0.04	Outreach	OSWER Indian Workshop in Albuquerque to inform tribes of proposed regulations, LUST Trust Fund, and Indian Lands Pilot Projects (Regions 8 & 9). Also had a regional seminar to inform tribes of UST program strategies.
		0.02	D/I	Investigate voluntary compliance program under UST with tribal governments.
Region 8	$3.0	0.10	Outreach	Site investigation of a leaking underground storage tank and incidental training.
		0.10	Outreach	Overall solid waste coordination on Indian lands including program oversight, technical assistance, program information, and compliance statistics. Coordination activities always include involvement, cooperation and assistance from IHS, BIA, HUD, and individual states.
		0.05	D/I	Inspected Turtle Mtn. reservation landfill and manufacturing company. Uncovered RCRA (hazardous waste) violations at company. Turned over report for enforcement action.
	$20.0	0.10	T/A	OSW and regional funds for CERT to develop solid waste plan and acquire Block Grant ($100,000) from Sioux County, ND, for construction of a landfill at Ft. Yates

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE RCRA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 8 (Con't)	$9.5	0.05	T/A	Regional funds to evaluate landfill site on Blackfeet Reservation plus development of landfill operation plan.
		0.16	T/A	Pilot project for tank inventory and UST training.
		0.10	T/A	T/A through CERT to develop solid waste ordinance for Uintah & Ouray Tribe plus look for surplus GSA solid waste equipment. Develop MOU with Uintah County & Tribe.
Region 9		0.10	T/A	IAG with IHS in Arizona to fund a one year pilot project for a circuit rider to assess the extent of UST related human health and environmental problems on Indian lands.
		0.10	T/A	Oversee responsible party search and preliminary site assessment for release of UST at Tuba City and Gila River in AZ.
		0.50	D/I	Hazardous waste inspections, compliance and RCRA enforcement actions on Indian lands: * 18 inspections to identify non-notifiers. * two final 3008(a) consent orders. * one 3008(c) complaint.
		0.06	T/A	Response to oral and written inquiries regarding applicability of Subtitle D on Indian lands.
		0.03	T/A	Subtitle D inspection on Indian reservation in Arizona.
Region 10		0.05	Outreach	Respond to inquiries regarding the applicability of RCRA Subtitle D (solid waste) on Indian lands.
		0.30	Outreach	Provision of UST information on regulations, technical guidance, etc. Development of Indian strategy
		0.20	T/A	Provide oversight of Warm Springs Reservation tank cleanup.
		0.05	D/I	National workgroup attendance; development of Indian project proposal for UST assistance.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE RCRA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 10 (Con't)		0.05	D/I	Manage Indian land notification data base.
		0.60	D/I	Compliance and permitting activities at RCRA facilities on reservations, primarily the Puyallup.
		0.05	D/I	Address jurisdictional issues on the implementation of RCRA on reservation land.
HQ		0.10	D/I	OUST has developed an "UST Program Indian Lands Strategy for FY 88 & FY 89 and Guidance for Regional Pilot Projects".
		0.10	D/I	OUST is developing a "Draft Interim Guidance on Conducting Emergency Federal Lead UST Corrective Actions for Petroleum Releases on Indian Lands".
	$50.0		D/I	The OUST/Region 8 Indian Lands Pilot Project is designed to assist in determining the extent of UST-related human health and environmental problems on Indian lands in Region 8.
		0.10	T/A	Coordinate Indian program efforts within OSW and with OFA. Examine issue regarding implementation of Subtitle D solid waste management program on Indian lands. Coordinate efforts among EPA, HUD, DOT and BIA to determine Agency responsibilities regarding solid waste management on Indian Lands. Work also includes coordination with OGC to analyze options and participate as Indian Work Group Coordinator for OSW.
	$50.0		D/I	The OUST/Region 9 Indian Lands Pilot Project is designed to assist in determining the extent of UST-related human health and environmental problems on Indian lands in Region 9.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE RCRA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
HQ (Con't)		0.10	Outreach	Participation in OSWER-wide outreach program to inform tribes of federal hazardous and solid waste management programs and their application to Indian lands. National meetings were held in Billings, MT, Albuquerque, NM, and Duluth, MN.
		0.01	T/A	Recommendations regarding implementation of Subtitle D solid waste management on Indian lands in EPA report to Congress. Recommendations included a statutory definition change similar to that made in the SDWA, and coordination among EPA, HUD, IHS, and BIA.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE TITLE III PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 1		0.02	T/A	With FEMA, conducted Title III briefing with tribes.
Region 5			Outreach	Jan. 1988- attended 3 meetings with Indian tribal leaders (Duluth, Wausau, Sault Ste. Marie) and presented information on the requirements of Title III.
Region 9		0.10	T/A	Title III outreach and implementation including section 305(a) of SARA.
Region 10		0.05	Outreach	Title III outreach and implementation including section 305(a) of SARA.
		0.01	Outreach	Met with Colville Tribes concerning the community right-to-know (Title III) program.
HQ Preparedness staff		0.17	Outreach	With OGC, developed draft Indian policy for implementing Title III of SARA. Distributed the National Response Team's Emergency Planning Guidebooks, Title III Fact Sheet, and the draft Indian policy to all federally-recognized tribes. Presented overview of program at three regional meetings and sought tribe input from the meeting on policy. Draft policy is intended to be finalized this fiscal year.
		0.02	Outreach	Review of HQ policy statements on Title III. Coordination of regional Title III Section 313 Coordinators with Regional Indian Program Coordinators or with tribes, as appropriate.
	$150.0	0.02	F/A	Coordinated the development of Federal Emergency Management Agency policy on training grants to Indian tribes. Cooperated with FEMA in the awarding of these grants.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE CERCLA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 2		0.40	Outreach	Region 2 Superfund staff and Indian Coordinator have been maintaining a close liaison with the St. Regis Mohawk Tribe, as a remedial investigation is completed on the GM Central Foundry Superfund site which borders on the reservation.
	$4.9	0.20	D/I	Site investigations were conducted for possible EPA removal actions on Tuscarora Reservation and Seneca Nation lands.
		0.20	D/I	Emergency clean-up actions and enforcement procedures for several oil spills on the Tuscarora Reservation and Seneca Nation lands under Section 311(k).
Region 5		0.02	D/I	Hazard ranking system package prepared for Fort Howard Lagoons on Oneida Reservation, WS. Site proposed to NPL on Update #7 in June FY 88.
		0.20	D/I	Regional staff is conducting preliminary assessments of sites discovered during field survey in FY 87. Site inspections will be conducted during FY 88 and FY 89.
			T/A	July 26-27 Duluth. Presentation on 4 OSWER programs to a meeting of all tribal leaders in the region.
			T/A	First Responders Courses (3) to tribal fire departments and other first responders. One course each in Michigan, Wisconsin, and Minnesota.
Region 6		0.10	Outreach	Meetings with Navajo Nation EPA staff to discuss regional Superfund program.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE CERCLA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 6 (Con't)		0.10	T/A	Regional team developed and provided Superfund training to Navajo Nation EPA staff.
		0.32	D/I	Superfund Indian Coordinator developed pre-award review questionnaire; reviewed Navajo response to financial status review; regional team performed pre-award financial systems review of Navajo Nation; team reviewed data compiled during review; interim findings prepared and forwarded to Navajos for comment; final report. Met with Regions 8 and 9 to discuss Region 6 initiatives and development of Navajo Superfund Program. Meetings with OFA, OSWER, and OERR to discuss Region 6 Superfund Indian initiatives and resource allocations. Development of proposal for remote-sensing pilot project for site discovery on Region 6 Indian lands. Development of a proposal for the establishment and funding of a Region 6 Inter-Tribal Hazardous Waste Council. Meetings with Navajo Nation Superfund Office to negotiate Multi-Site Cooperative Agreement, Core Program Cooperative Agreement, and Superfund Memorandum of Agreement.
		0.05	D/I	Superfund staff comparative review of CERT data, compiled as part of a national study, and regional CERCLIS data base.
		0.02	D/I	Superfund staff review of Navajo potential hazardous waste site list.
		0.04	T/A	Development and presentation of Superfund Program during Region 6 Indian Tribal Meeting.
	$0.2	0.02	D/I	Superfund staff participation in public meeting for United Nuclear site; provided a translator for Navajo citizens impacted by site.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE CERCLA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 6 (Con't)		0.02	D/I	Community Relations Coordinator meetings with Navajo EPA staff to discuss Community Relations activities and meeting with Navajo citizens impacted by United Creosoting site.
		0.01	D/I	Superfund staff meeting with Cherokee Nation and New Mexico Pueblo Council to discuss Superfund Program and potential pre-award review prior to development of Multi-Site Cooperative Agreement and Core Program Cooperative Agreement.
		0.05	T/A	Superfund staff to provide Superfund training to Cherokee EPA and Pueblo Hazardous Waste staffs.
		0.01	D/I	Superfund Indian Coordinator meeting with Quapaw Tribe regarding status of Tar Creek site.
		0.02	D/I	Superfund staff meeting with New Mexico Environmental Improvement Division regarding Prewitt Refining site on Navajo lands.
		0.02	D/I	Superfund Indian Coordinator meetings with Regional Indian Coordinator regarding proposed Region 6 hazardous waste initiatives and Indian Workshop.
Region 8	$50.0	0.80	D/I	Develop and carry out a site discovery program under CERCLA on all regional Indian reservations.
	$2.0	0.02	D/I	Worked with Regions 6 and 9 on development of a Superfund MOA with the Navajo Nation. Continued involvement with the Navajo Nation.
	$6.0	0.10	D/I	Conduct of preliminary assessments at two sites on Indian lands.
Region 9				FIT is conducting a Screening Site Inspection at the Puerco River, also on Navajo land.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE CERCLA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 9 (Con't)	$50.0	1.0	D/I	A Listing Site Inspection is being conducted by Region 9 Field Investigation Team contractor at Cameron-Gray Mtn. uranium mine and tailings site on Navaho land.
Region 10		0.02	D/I	Responding to concerns of the Coeur D'Alene Tribe regarding the impacts of the Bunker Hill Superfund site.
		0.05	D/I	Consulting with Puyallup Tribe regarding Commencement Bay NPL site; discussion included potential tribal involvement in source control and habitat issues through cooperative . agreements.
HQ	$85.0	1.02	Outreach D/I	Design and begin development of Indian identifiers in CERCLIS. Prepare presentation and materials for OSWER workshops for Indians; provide representation for workshops; develop guidance for regions on how to involve Indian tribal governments in the Superfund program; meet with Indians or their representatives on how the governing bodies of tribes can be involved in Superfund and receive Superfund assistance. Coordinate Indian program activities with OFA.
	$20.0	0.20	Outreach	Prepare and submit to Congress the report required under section 126(c), discussing hazardous waste sites on Indian lands.
		0.01	Outreach	Participate in meetings conducted by national Indian organizations to discuss the Superfund program and Indian involvement.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE CERCLA PROGRAMS

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
HQ (Con't)	$30.0	0.5	Outreach T/A	Develop a booklet discussing the Superfund Program in general, and the site discovery process specifically, and distribute to all Indian tribes.
		0.25	Outreach T/A	Coordinate with regional offices in the development and implementation of Superfund site discovery pilot programs on Indian lands.
HQ-OWPE	Travel only	0.05	Outreach T/A	Indian lands environmental training: a program to explain the enforcement programs under RCRA and CERCLA to tribal leaders and other affected people (e.g., BIA and IHS). The program also provides assistance and guidance on the development of tribal enforcement programs.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

THE OFFICE OF EXTERNAL AFFAIRS

Office of Federal Activities

Within the Office of External Affairs, the Office of Federal Activities (OFA) is responsible for establishing effective liaison and coordination between EPA and other federal agencies on environmental issues and for working with those agencies to assure that they carry out their activities in an environmentally sound manner; for assuring that EPA's programs comply with the goals and requirements of the National Environmental Policy Act (NEPA) and related environmental legislation; and for coordinating implementation of EPA's programs related to protection of human health and the environment on Indian reservations. OFA's programs are multi-media in nature and consider impacts on natural resources and environmental values, as well as on public health.

The objectives of EPA's Indian program are (1) to strengthen EPA program coverage on Indian reservations in order to restore and protect environmental quality, and (2) to assist tribal governments in developing the necessary infrastructure and technical skills to assure maintenance of environmental quality in the future.

OFA's program is directed to coordinating the Agency's efforts in working to ensure that EPA programs can be implemented on Indian reservations. These efforts include statutory amendments, regulatory changes, policy statements, and increased emphasis on Indian needs in the program and fiscal planning processes, as well as communication planning that will provide for consulting with and making information available to the tribes on EPA program and policy matters. In addition, support and guidance are given to the regions, where Regional Indian Program Coordinators serve as the primary contact for the tribes and oversee regional activities with Indian tribal governments.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF FEDERAL ACTIVITIES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 1		0.06	Outreach	Indian Work Group calls and meetings, mailings, and response to information requests.
		0.02	T/A	Under a CERT technical assistance contract, a water quality management plan for the Penobscot Nation was developed.
Region 2	$40.0	0.10	T/A	Under the CERT technical assistance contract, technical assistance is provided to the St. Regis Mohawk Tribe for water quality management.
		0.30	D/I	Overall Indian Policy coordination, including development of a Regional Indian Strategy, and Indian Work Group participation.
		0.10	Outreach	In response to a request from the St. Regis Mohawk Tribe, Region 2 is developing a comprehensive agreement to address the tribe's environmental needs/concerns.
Region 4		0.01	Outreach	Participated in monthly conference calls of Indian Work Group.
		0.02	Outreach	Participated in Indian Work Group Meetings.
		0.02	Outreach	Met with tribal representatives to determine tribal environmental needs and to offer technical assistance.
Region 5	$60.0	0.15	T/A	Funded two SEE Indian Environmental Liaisons, one each for MN and MI tribes. They will serve as multi-media liaisons between tribes Region 5.
		1.0	T/A	Continued the Interagency Personnel Act agreement with the Wisconsin Department of Natural Resources to provide a circuit-riding environmental consultant to Wisconsin Tribes.
	$7.5	0.25	D/I	Under the National Network for Environmental Policy a summer intern was hired to study solid waste problems on tribal lands.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF FEDERAL ACTIVITIES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5 (Con't)	$15.0	0.05	D/I	3 regional meetings with tribes to discuss multi-media provisions of EPA programs for tribes in MN, WI and MI.
		0.05	T/A	The region has participated in NCAI, CERT, Office of Water and OSWER national meetings, as requested.
		0.20	T/A	The region finalized a 5-agency MOU with EPA, IHS, BIA HUD and the U.S. Geological Survey. This multi-media MOU provides for federal agency cooperation and coordination in regards to environmental programs on Indian lands. Quarterly meetings are held.
		0.10	T/A	Multi-media regional Indian workgroup meetings are held monthly, to coordinate EPA Indian policy implementation in the region.
		0.05	T/A	Continued support to the development of the Menominee national pilot project.
		0.10		Overall Indian policy coordination at national and regional level, and National Indian Work Group participation.
		0.10	D/I	Completed a joint environmental inventory of tribal lands on all 29 reservations in the region. This was a cooperative effort by EPA, CERT and GLIFWC. ($40K in FY 87).
		0.03		Assisted tribes with remedial action plans in cooperation with states and other federal agencies for the Oneida, Fond Du Lac and St. Regis Mohawk tribes.
	$25.0	0.05	T/A	Under the CERT technical assistance contract a regional strategy will be developed for implementing the EPA Indian Policy in Region 5.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF FEDERAL ACTIVITIES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 5 (Con't)	**$5.0**	0.05	**D/I**	**Regional training conference was held for the Region 5 tribes. The July conference was coordinated by the Great Lakes Inter-Tribal Council.**
Region 6	**$23.0**	0.05	Outreach	**Spoke at EPA and ABA conferences on Indians and the environment; co-host two-day tribal meeting in Region 6.** Training in Indian sensitivity and Institute scholar on Indian lands.
	$41.0		T/A	Under the ÇERT technical assistance contract assisted the Cherokee Nation to assess solid waste issues and develop a management plan.
		1.0	Outreach	Overall Indian programs coordination in Region 6, including providing consultation to tribes, participating in the national Indian Work Group, and implementing the Indian Policy at the regional level.
Region 7	$5.0		T/A	Training for tribes conducted by Indian Health Service.
		0.03	Outreach	Attended Indian Work Group Meetings.
		0.08	Outreach	Reservation visits/meetings with tribal leaders.
		0.04	T/A	Coordination meetings with IHS.
Region 8	$30.0		T/A	Funds set aside to hire a Senior Environmental Employee to work with the tribes in North and South Dakota on establishing their environmental programs.
	$25.0		T/A	As part of the CERT interagency technical assistance contract, work was begun on a comprehensive environmental needs assessment on all reservations in Region 8, to be supplemented with a training session on EPA programs for all tribes.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF FEDERAL ACTIVITIES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 8 (Con't)	$15.0		F/A	Grant to CERT to complete a prior effort begun to conduct a reservation-by-reservation environmental needs assessment covering all media programs, assisting tribes with setting a priority list of their environmental problems.
	$5.0		F/A	Grant to CERT to co-sponsor a tribal environmental conference focusing on training tribal environmental staff on new EPA regulations.
			T/A	Senior Environmental Employee hired by the Montana Operations Office to work with the tribes in Montana (FY 87 funding).
		1.20	D/I	Overall Indian programs coordination in Region 8, including providing consultation to tribes, chairing regional Indian workgroup, participating in the national Indian Work Group, and implementing the Indian policy at the regional level and in the Montana Operations Office.
Region 9	$37.0		D/I	SEE employee to perform as Indian Environmental Liaison to work with reservations along the Lower Colorado River in California and Arizona. To assist tribes particularly with regard to environmental issues pertaining to federal requirements of CWA, SDWA, and Superfund Amendments.
	$20.0		F/A	Grant to the Gila River Community to establish a pilot program to develop and manage a water resource department, including training and data evaluation.
		0.05	D/I	Review of draft environmental assessment for proposed asbestos monofill project on Cortina Rancheria.
		0.75	D/I	Overall Indian program coordination and Indian Work Group participation.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF FEDERAL ACTIVITIES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 9 (Con't)		0.15	Outreach	General liaison with tribal leaders and tribal organizations on broad issues; general mailings and informing tribes regarding agency activities, seeking tribal input.
	$25.0	0.02	T/A	Solicit project proposals from tribes for CERT funding. Review and select project for funding. Monitor and evaluate selected projects.
	$5.0		F/A	Provide funds to support Tohono O'Odham Tribe's Outreach Program. Includes the tribe's PWSS program staff's visit to 22 reservation villages to discuss public water supplies and the relationship and potential impact of solid waste and wastewater facilities on the groundwater sources of drinking water.
Region 10		1.2	D/I	Overall Indian Policy coordination activities, participation on national Indian Work Group, participation in OW and NCAI national meetings, and general liaison with tribal leaders and tribal organizations on environmental issues.
	$30.0	0.01	T/A	Funded an SEE Indian Environmental Liaison to work with the Yakima Indian Nation.
	$25.0		F/A	Funding for Council of Energy Resource Tribes technical assistance to the Umatilla Tribe.
	$13.7		F/A	CWA Section 104(b)(3) grant to the Lummi Tribe for additional work on a shellfish protection plan.
	$6.3		F/A	CWA Section 104(b)(3) grant to the Suquamish Tribe to study water quality of Miller Bay.
		0.04	Outreach	EPA Oregon Operations Office conducted a series of general meetings with the Umatilla tribe covering all EPA programs, EPA-Indian Policy and funding issues.
		0.05	Outreach	Provide information to the Makah Tribe regarding the Air Force Station closure concerns.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF FEDERAL ACTIVITIES

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 10 (Con't)		0.30	D/I	Grant administration work with the Lummi, Colville, and Suquamish Tribes.
		0.01	Outreach	Regional participation in Indian Health Service annual Environmental Health Meeting and the National Indian Health Board Conference in Seattle.
HQ	$15.0		D/I	Preliminary study on existing information management systems and the need for a data base/ information system for reservation environmental conditions and programs.
	$1.5		D/I	Logistical support to the OSWER regional information meetings with tribes.
	$0.8		D/I	Logistical support to the Indian Work Group.
	$40.0		Outreach	Training associated with the Handbook on EPA Programs developed by NCAI with a Ford Foundation grant.
	$20.0	0.7	D/I	A senior environmental employment program professional to assist in the Indian program.
	$6.0	0.25	D/I	Under the National Network for Environmental Policy, a summer intern was hired to study solid waste issues.
		2.4		Oversight of Agency's Indian Policy Implementation.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF GENERAL COUNSEL/ OFFICE OF REGIONAL COUNSEL

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
Region 1		0.05	Outreach	Participate on Indian Attorney's Work Group and general liaison.
Region 4		0.05	D/I	Efforts include informal program counseling, preparation of formal opinions, litigation, drafting of proposed legislative changes, and participation in Indian Work Group activities.
Region 5		0.70	D/I	Providing legal counsel to program offices; reviewing MOAs and tribal regulations; reviewing EPA regulations which affect tribes; participating in regional and national Indian workgroups; case-specific counseling.
Region 6		0.5	D/I	Providing legal counsel to program offices; reviewing MOAs and tribal regulations; reviewing EPA regulations which affect tribes; participate in national Indian work groups; case-specific counseling.
Region 8		1.0	D/I	Review CAA. Legal research and review on CAA 105 grants and TIPs. CWA and SDWA implementation issues and jurisdictional analyses. Regulatory revision of environmental statutes. Lead Region Indian Attorney Workgroup, conference calls, memos, and meetings. Review Superfund legal issues.
Region 9		0.02	D/I	Efforts include informal program counseling, preparation of formal opinions, litigation, drafting of proposed legislative changes, and participation in Indian Work Group activities.
Region 10		0.75	D/I	Provide legal counsel to program offices; review MOAs and tribal regulations; review of EPA regulations that affect tribes; lead and participate in regional and national Indian Work Groups, including conference calls, memos and meetings; draft and review proposed changes to legislation; and review litigation.

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

OFFICE OF GENERAL COUNSEL/ OFFICE OF REGIONAL COUNSEL

PROGRAM HEADING	($000) FUNDING	WORK YEARS	TYPE	PROGRAM DESCRIPTION
HQ		1.20	D/I	Efforts include CWA-SDWA regulation development; informal program counseling and preparation of formal opinions; litigation; participation in Indian Work Group activities.

EPA REGIONAL INDIAN WORK GROUP COORDINATORS

ANNE FENN
INDIAN COORDINATOR
EPA REGION I (PAG 2300)
JFK FEDERAL BUILDING
BOSTON MA 02203
617-565- 3395
FTS-8-835-3395

ROBERT HARGROVE
INDIAN COORDINATOR
EPA REGION II (2PM-E1)
26 FEDERAL PLAZA
NEW YORK NY 10278
212-264-1892
FTS-8-264-1892

ARTHUR LINTON
INDIAN COORDINATOR
EPA REGION IV (EAB-4)
345 COURTLAND STREET NE
ATLANTA GA 30365
404-881-3776
FTS-8-257-3776

CASEY AMBUTAS
INDIAN COORDINATOR
EPA REGION V (5ME14)
230 SOUTH DEARBORN ST
CHICAGO IL 60604
312-353-1394
FTS-8-353-1394

ERNEST WOODS
INDIAN COORDINATOR
EPA REGION VI (6E-FF)
1445 ROSS AVENUE
DALLAS TX 75202
214-655-2260
FTS-8-255-2260

MICHAEL BRONOWSKI
INDIAN COORDINATOR
EPA REGION VII
762 MINNESOTA AVENUE
KANSAS CITY KS 66101
913-236-2823
FTS-8-757-2823

SADIE HOSKIE
INDIAN COORDINATOR
EPA REGION VIII (80EA)
999 18TH STREET
DENVER CO 80202
303-294-7596
FTS-8- 564-7596

ROCCENA LAWATCH
INDIAN COORDINATOR
EPA REGION IX (E-4)
215 FREMONT STREET
SAN FRANCISCO CA 94105
415-974-8323
FTS-8-454-8323

GRETCHEN HAYSLIP
INDIAN COORDINATOR
EPA REGION X
1200 SIXTH AVENUE
SEATTLE WA 98101
206-442-8512
FTS-8-399-8512

MARTIN D. TOPPER, Ph.D.
NATIONAL INDIAN
PROGRAM COORDINATOR
U.S. EPA
401 M STREET SW
WASHINGTON, DC 20460
202-382-7063
FTS-8-382-7063

EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 88

GLOSSARY OF ACRONYMS

AARP = American Association of Retired Persons

ABA = American Bar Association

AHERA = Asbestos Hazard Emergency Response Act

AIMPAC = Asbestos Inspection and Management Plan Assistance Program

AO = Administrative Order

ASHAA = Asbestos School Hazard Abatement Act

AWWA = American Water Works Association

BIA = Bureau of Indian Affairs

BLM = Bureau of Land Management

CAA = Clean Air Act

CDBG = Community Development Block Grant

CERCLA = Comprehensive Environmental Response, Compensation and Liability Act

CERCLIS = Comprehensive Environmental Response, Compensation and Liability Information System

CERT = Council of Energy Resource Tribes

CWA = Clean Water Act

D/I = Direct Implementation

F/A = Financial Assistance

FEMA = Federal Emergency Management Agency

FIFRA = Federal Insecticide, Fungicide, and Rodenticide Act

FIT = Field Investigation Team (Superfund Contractor)

FTS = Federal Telephone System (Federal Communications Network)

FY = Fiscal Year (October 1 - September 30)

GLIFWC = Great Lakes Indian Fish and Wildlife Commission

GSA = General Services Administration

HUD = Department of Housing and Urban Development

IAG = Interagency Agreement

IHS = Indian Health Service

K = Thousand (Usually $)

LUST = Leaking Underground Storage Tanks

MCL = Maximum Contaminant Level

MOA = Memorandum of Agreement

MOU = Memorandum of Understanding

M/R = Monitoring Report

MRWA = Minnesota Rural Water Association

N/A = Not Applicable

NCAI = National Congress of American Indians

NNEPS = National Network for Environmental Policy Studies

NPDES = National Pollutant Discharge Elimination System (CWA)

NPL = National Priorities List (Superfund)

OAR = Office of Air and Radiation

ODW = Office of Drinking Water (Within OW)

OEA = Office of External Affairs

OERR = Office of Emergency and Remedial Response (Within OSWER)

OFA = Office of Federal Activities (Within OEA)

OGC = Office of General Council

O&M = Operation and Maintenance

OMPC = Office of Municipal Pollution Control (Within OW)

OPPE = Office of Policy, Planning and Evaluation

OPTS = Office of Pesticides and Toxic Substances

ORC= Office of Regional Counsel

ORD = Office of Research and Development

OSWER = Office of Solid Waste and Emergency Response

OWPE = Office of Waste Programs Enforcement (within OSWER)

Outreach = Communication

OUST = Office of Underground Storage Tanks

OW = Office of Water

PSD = Prevention of Significant Deterioration (CAA)

PTS = Pesticides and Toxic Substances

PWSS = Public Water Supply System

RCRA = Resource Conservation and Recovery Act

R&D = Research and Development

SARA = Superfund Amendments and Reauthorization Act

SCTCA = Southern California Tribal Chairmans' Association

SDWA = Safe Drinking Water Act

SEE = Senior Environmental Employee (Employed through AARP)

SSA = Sole Source Aquifer

STP = Sewage Treatment Plant

T/A= Technical Assistance

TIP = Tribal Implementation Plan (Clean Air Act)

Title II = Construction Grant Program for Wastewater Treatment Facilities (CWA)

TSCA = Toxic Substances Control Act

TSD = Transport, Storage, Disposal (Facilities under RCRA Subtitle C)

UIC = Underground Injection Control

UMTRA = Uranium Mines Tailing Remedial Action

USGS = United States Geological Survey

UST = Underground Storage Tank

VOC = Volatile Organic Chemical

WHP = Wellhead Protection (SDWA)

WQS = Water Quality Standards

WY = Workyear

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, [illegible] will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

William D. Ruckelshaus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 8 1984

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Indian Policy Implementation Guidance

FROM: Alvin L. Alm
Deputy Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel

INTRODUCTION

The Administrator has signed the attached EPA Indian Policy. This document sets forth the broad principles that will guide the Agency in its relations with American Indian Tribal Governments and in the administration of EPA programs on Indian reservation lands.

This Policy concerns more than one hundred federally-recognized Tribal Governments and the environment of a geographical area that is larger than the combined area of the States of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine. It is an important sector of the country, and constitutes the remaining lands of America's first stewards of the environment, the American Indian Tribes.

The Policy places a strong emphasis on incorporating Tribal Governments into the operation and management of EPA's delegable programs. This concept is based on the President's Federal Indian Policy published on January 24, 1983 and the analysis, recommendations and Agency input to the EPA Indian Work Group's Discussion Paper, Administration of Environmental Programs on American Indian Reservations (July 1983).

TIMING AND SCOPE

Because of the importance of the reservation environments, we must begin immediately to incorporate the principles of EPA's Indian Policy into the conduct of our everyday business. Our established operating procedures (including long-range budgetary and operational planning activities) have not consistently focused on the proper role of Tribal Governments or the special legal and political problems of program management on Indian lands. As a result, it will require a phased and sustained effort over time to fully implement the principles of the Policy and to take the steps outlined in this Guidance.

Some Regions and Program Offices have already made individual starts along the lines of the Policy and Guidance. I believe that a clear Agency-wide policy will enable all programs to build on these efforts so that, within the limits of our legal and budgetary constraints, the Agency as a whole can make respectable progress in the next year.

As we begin the first year of operations under the Indian Policy, we cannot expect to solve all of the problems we will face in administering programs under the unique legal and political circumstances presented by Indian reservations. We can, however, concentrate on specific priority problems and issues and proceed to address these systematically and carefully in the first year. With this general emphasis, I believe that we can make respectable progress and establish good precedents for working effectively with Tribes. By working within a manageable scope and pace, we can develop a coordinated base which can be expanded, and, as appropriate, accelerated in the second and third years of operations under the Policy.

In addition to routine application of the Policy and this Guidance in the conduct of our everyday business, the first year's implementation effort will emphasize concentrated work on a discrete number of representative problems through cooperative programs or pilot projects. In the Regions, this effort should include the identification and initiation of work on priority Tribal projects. At Headquarters, it should involve the resolution of the legal, policy and procedural problems which hamper our ability to implement the kinds of projects identified by the Regions.

The Indian Work Group (IWG), which is chaired by the Director of the Office of Federal Activities and composed of representatives of key regional and headquarters offices, will facilitate and coordinate these efforts. The IWG will begin immediately to help identify the specific projects which may be ripe for implementation and the problems needing resolution in the first year.

Because we are starting in "mid-stream," the implementation effort will necessarily require some contribution of personnel time and funds. While no one program will be affected in a major fashion, almost all Agency programs are affected to some degree. I do not expect the investment in projects on Indian Lands to cause any serious restriction in the States' funding support or in their ability to function effectively. To preserve the flexibility of each Region and each program, we have not set a target for allocation of FY 85 funds. I am confident, however, that Regions and program offices can, through readjustment of existing resources, demonstrate significant and credible progress in the implementation of EPA's Policy in the next year.

ACTION

Subject to these constraints, Regions and program managers should now initiate actions to implement the principles of the Indian Policy. The eight categories set forth below will direct our initial implementation activities. Further guidance will be provided by the Assistant Administrator for External Affairs as experience indicates a need for such guidance.

1. THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS WILL SERVE AS LEAD AGENCY CLEARINGHOUSE AND COORDINATOR FOR INDIAN POLICY MATTERS.

This responsibility will include coordinating the development of appropriate Agency guidelines pertaining to Indian issues, the implementation of the Indian Policy and this Guidance. In this effort the Assistant Administrator for External Affairs will rely upon the assistance and support of the EPA Indian Work Group.

2. THE INDIAN WORK GROUP (IWG) WILL ASSIST AND SUPPORT THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS IN DEVELOPING AND RECOMMENDING DETAILED GUIDANCE AS NEEDED ON INDIAN POLICY AND IMPLEMENTATION MATTERS. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD DESIGNATE APPROPRIATE REPRESENTATIVES TO THE INDIAN WORK GROUP AND PROVIDE THEM WITH ADEQUATE TIME AND RESOURCES NEEDED TO CARRY OUT THE IWG'S RESPONSIBILITIES UNDER THE DIRECTION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS.

The Indian Work Group, (IWG) chaired by the Director of the Office of Federal Activities, will be an important entity for consolidating the experience and advice of the key Assistant and Regional Administrators on Indian Policy matters. It will perform the following functions: identify specific legal, policy, and procedural impediments to working directly with Tribes on reservation problems; help develop appropriate guidance for overcoming such impediments; recommend opportunities for implementation of appropriate programs or pilot projects; and perform other services in support of Agency managers in implementing the Indian Policy.

The initial task of the IWG will be to develop recommendations and suggest priorities for specific opportunities for program implementation in the first year of operations under the Indian Policy and this Guidance.

To accomplish this, the General Counsel and each Regional and Assistant Administrator must be actively represented on the IWG by a staff member authorized to speak for his or her office. Further, the designated representative(s) should be afforded the time and resources, including travel, needed to provide significant staff support to the work of the IWG.

3. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD UNDERTAKE ACTIVE OUTREACH AND LIAISON WITH TRIBES, PROVIDING ADEQUATE INFORMATION TO ALLOW THEM TO WORK WITH US IN AN INFORMED WAY.

In the first thirteen years of the Agency's existence, we have worked hard to establish working relationships with State Governments, providing background information and sufficient interpretation and explanations to enable them to work effectively with us in the development of cooperative State programs under our various statutes. In a similar manner, EPA managers should try to establish direct, face-to-face contact (preferably on the reservation) with Tribal Government officials. This liaison is essential to understanding Tribal needs, perspectives and priorities. It will also foster Tribal understanding of EPA's programs and procedures needed to deal effectively with us.

4. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD ALLOCATE RESOURCES TO MEET TRIBAL NEEDS, WITHIN THE CONSTRAINTS IMPOSED BY COMPETING PRIORITIES AND BY OUR LEGAL AUTHORITY.

As Tribes move to assume responsibilities similar to those borne by EPA or State Governments, an appropriate block of funds must be set aside to support reservation abatement, control and compliance activities.

Because we want to begin to implement the Indian Policy now, we cannot wait until FY 87 to formally budget for programs on Indian lands. Accordingly; for many programs, funds for initial Indian projects in FY 85 and FY 86 will need to come from resources currently planned for support to EPA-and State-managed programs meeting similar objectives. As I stated earlier, we do not expect to resolve all problems and address all environmental needs on reservations immediately. However, we can make a significant beginning without unduly restricting our ability to fund ongoing programs.

I am asking each Assistant Administrator and Regional Administrator to take measures within his or her discretion and authority to provide sufficient staff time and grant funds to allow the Agency to initiate projects on Indian lands in FY 85 and FY 86 that will constitute a respectable step towards implementation of the Indian Policy.

5. ASSISTANT AND REGIONAL ADMINISTRATORS, WITH LEGAL SUPPORT PROVIDED BY THE GENERAL COUNSEL, SHOULD ASSIST TRIBAL GOVERNMENTS IN PROGRAM DEVELOPMENT AS THEY HAVE DONE FOR THE STATES.

The Agency has provided extensive staff work and assistance to State Governments over the years in the development of environmental programs and program management capabilities. This assistance has become a routine aspect of Federal/State relations, enabling and expediting the States' assumption of delegable programs under the various EPA statutes. This "front end" investment has promoted cooperation and increased State involvement in the regulatory process.

As the Agency begins to deal with Tribal Governments as partners in reservation environmental programming, we will find a similar need for EPA assistance. Many Regional and program personnel have extensive experience in working with States on program design and development; their expertise should be used to assist Tribal Governments where needed.

6. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD TAKE ACTIVE STEPS TO ALLOW TRIBES TO PROVIDE INFORMED INPUT INTO EPA'S DECISION-MAKING AND PROGRAM MANAGEMENT ACTIVITIES WHICH AFFECT RESERVATION ENVIRONMENTS.

Where EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments. Agency managers should make a special effort to inform Tribes of EPA decisions and activities which can affect their reservations and solicit their input as we have done with State Governments. Where necessary, this should include providing the necessary information, explanation and/or briefings needed to foster the informed participation of Tribal Governments in the Agency's standard-setting and policy-making activities.

7. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD, TO THE MAXIMUM FEASIBLE EXTENT, INCORPORATE TRIBAL CONCERNS, NEEDS AND PREFERENCES INTO EPA'S POLICY DECISIONS AND PROGRAM MANAGEMENT ACTIVITIES AFFECTING RESERVATIONS.

It has been EPA's practice to seek out and accord special consideration to local interests and concerns, within the limits allowed by our statutory mandate and nationally established criteria and standards. Consistent with the Federal and Agency policy to recognize Tribal Governments as the primary voice for expressing public policy on reservations, EPA managers should, within the limits of their flexibility, seek and utilize Tribal input and preferences in those situations where we have traditionally utilized State or local input.

We recognize that conflicts in policy, priority or preference may arise between States and Tribes as it does between neighboring States. As in the case of conflicts between neighboring States, EPA will encourage early communication and cooperation between Tribal and State Governments to avoid and resolve such issues. This is not intended to lend Federal support to any one party in its dealings with the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the interests of both.

Several of the environmental statutes include a conflict resolution mechanism which enables EPA to use its good offices to balance and resolve the conflict. These procedures can be applied to conflicts between Tribal and State Governments that cannot otherwise be resolved. EPA can play a moderating role by following the conflict resolution principles set by the statute, the Federal trust responsibility and the EPA Indian Policy.

8. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD WORK COOPERATIVELY WITH TRIBAL GOVERNMENTS TO ACHIEVE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS, CONSISTENT WITH THE PRINCIPLE OF INDIAN SELF-GOVERNMENT.

The EPA Indian Policy recognizes Tribal Governments as the key governments having responsibility for matters affecting the health and welfare of the Tribe. Accordingly, where tribally owned or managed facilities do not meet Federally established standards, the Agency will endeavor to work with the Tribal leadership to enable the Tribe to achieve compliance. Where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as we do to noncompliance by the private sector off-reservation.

Actions to enable and ensure compliance by Tribal facilities with Federal statutes and regulations include providing consultation and technical support to Tribal leaders and managers concerning the impacts of noncompliance on Tribal health and the reservation environment and steps needed to achieve such compliance. As appropriate, EPA may also develop compliance agreements with Tribal Governments and work cooperatively with other Federal agencies to assist Tribes in meeting Federal standards.

Because of the unique legal and political status of Indian Tribes in the Federal System, direct EPA actions against Tribal facilities through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Regional Administrators proposing to initiate such action should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel. In emergency situations, the Regional Administrator may issue emergency Temporary Restraining Orders, provided that the appropriate procedures set forth in Agency delegations for such actions are followed.

9. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD BEGIN TO FACTOR INDIAN POLICY GOALS INTO THEIR LONG-RANGE PLANNING AND PROGRAM MANAGEMENT ACTIVITIES, INCLUDING BUDGET, OPERATING GUIDANCE, MANAGEMENT ACCOUNTABILITY SYSTEMS AND PERFORMANCE STANDARDS.

In order to carry out the principles of the EPA Indian Policy and work effectively with Tribal Governments on a long-range basis, it will be necessary to institutionalize the Agency's policy goals in the management systems that regulate Agency behavior. Where we have systematically incorporated State needs, concerns and cooperative roles into our budget, Operating Guidance, management accountability systems and performance standards, we must now begin to factor the Agency's Indian Policy goals into these same procedures and activities.

Agency managers should begin to consider Indian reservations and Tribes when conducting routine planning and management activities or carrying out special policy analysis activities. In addition, the IWG, operating under the direction of the Assistant Administrator for External Affairs and with assistance from the Assistant Administrator for Policy, Planning and Evaluation, will identify and recommend specific steps to be taken to ensure that Indian Policy goals are effectively incorporated and institutionalized in the Agency's procedures and operations.

Attachment

ATTACHMENT 4

INDIAN WORK GROUP MEMBERS*

Anne Fenn, Indian Program Coordinator, Region 1
Robert Hargrove, Chief, Environmental Impacts Branch, Region 2
Arthur Linton, Chief, Federal Facilities Coordination Office, Region 4
Casey Ambutas, Regional Indian Affairs Coordinator, Region 5
Ernest Woods, Regional Indian Program Coordinator, Region 6
Michael Bronowski, Indian Coordinator, Region 7
Sadie Hoskie, Indian Program Coordinator, Region 8
Roccena Lawatch, Native American Program Coordinator, Region 9
Gretchen Hayslip, Indian Program Coordinator, Region 10

Martin D. Topper, Ph.D, National Indian Program Coordinator, Office of Federal Activities
James Horne, Director, Office of Water Policy, Office of Water
Paul Rasmussen, Director, National Evaluation Staff, Office of Air and Radiation
Jose Acevedo, Indian Coordinator, Office of Solid Waste and Emergency Response
Tom Hooven, Program Specialist, Office of Pesticides and Toxic Substances
David Coursen, Attorney Adviser, Office of General Counsel
Douglas Cooper, Special Assistant for Indian Programs, Office of the Administrator

---

* Indian Work Group members represent the Regional Administrators and the Media Program Assistant Administrators. Representatives from individual program offices or other offices within the Agency are also welcome to attend and participate in Indian Work Group meetings. Since there are no federally-recognized tribes in Region 3, its Regional Administrator is not represented on the Indian Work Group.

ATTACHMENT 5

ANNOTATED RECOMMENDATIONS
OF THE
EPA INDIAN WORK GROUP

APRIL 14-16, 1987

1. Using current initiatives, develop a base communications strategy for Indian tribes that can be used by the program and regional offices and that will facilitate the development of a consistent Agency approach to establishing effective two-way communication with tribal representatives.

Comment: This strategy will be developed by the Office of Federal Activities in coordination with the program and regional offices. It will use approaches already proposed or in use by program and regional offices, adding to these approaches as appropriate. It will serve as a framework for use by the programs and regions in the future, and will provide recommended Agency approaches to working with tribes. If it is issued by the Administrator or Deputy Administrator it will also serve as a positive policy statement to the programs and regions that they should be communicating on a regular and effective basis with tribal representatives.

2. Develop a concept paper for the establishment of a tribal/EPA committee to assist the Agency in working out the issues that will arise as we pursue full implementation of the Indian Policy.

Comment: The regional Indian program coordinators and the headquarters offices that are currently working to implement the reauthorized statutes believe that there is a critical need for some kind of tribal group with which EPA can consult when developing policies, selecting tribal representatives for workgroups, etc. There is no central Indian organization, and yet we cannot consult regularly with the representatives of 278 federally-recognized reservations. The IWG believes that a concept paper should be developed by OFA to consider alternatives for meeting this need, and meeting it in such a way that the tribes will continue to recognize that the regional offices are the appropriate level for operating programs. Tribal advisory groups have been established by both the Department of Education and the Department of Housing and Urban Development with apparent success.

3. The Office of Water and the Office of Emergency and Remedial Response should hold a series of meetings with the tribes as soon as possible to describe the three reauthorized acts and discuss with the tribes how these acts may affect them.

Comment: The tribes are aware that the statutes call for consultation with them, and that this was a pledge of the Indian Policy. In addition, current misunderstanding of what the statutes will mean for them is raising levels of expectation that will probably result in a negative reaction to EPA. What is needed is a set of meetings with tribal representatives to describe what our activities have been with states and what the reauthorized statutes may mean for the tribes. We need to stress both the opportunities and the limitations. This is especially important since EPA's programs are not like those of the agencies that have historically worked with tribal governments - Department of the Interior, Department of Commerce, Department of Labor, etc. In addition, we need to get the tribal perspective in order to ensure that our regulations are developed to work most effectively with the tribal legal and institutional structures.

4. In view of the significant travel necessary to establish effective communication with and provide hands-on technical assistance to tribes, the Office of the Comptroller should pursue through the FY 1989 budget process an over-ceiling set-aside travel fund dedicated to Indian-related travel.

Comment: Effective two-way communication, training, and technical assistance all require opportunities to meet face-to-face. The reservations are generally located away from the major metropolitan areas that serve as our regional office network; they are far away from Washington, D.C. Existing travel needs already stress headquarters and especially regional travel accounts. The Agency's travel funds are distributed by the Comptroller's Office and are subject to a Congressional ceiling. Since the reauthorized statutes enable us to work directly with tribes and direct us to consult with them, the IWG believes that it would be appropriate for the Agency to request supplemental funding for travel, i.e., additional funds above the existing ceiling to meet the need resulting from the reauthorized statutes and our increasing activities with Indian tribes.

5. Encourage orientation sessions in headquarters and the regions to increase awareness of the unique legal, institutional and policy issues involved in working with tribal governments.

Comment: Many among the Agency's senior managers and staff do not understand why we "don't just let the states take care of the tribal environmental problems". They also do not understand that the historic tribal relationship with federal agencies has been different from that of the states. This affects how they relate to EPA and its programs. A recent orientation program in Region 5 for senior management was well received, and seems to have helped in providing a framework for future work with the tribes. By improving our understanding of "where the tribal leaders are coming from", we will be more likely to succeed at communicating and working with them.

6. As part of the FY 1989 budget initiative, National Program Managers should identify and request funds and personnel resources necessary to implement on Indian reservations the three reauthorized statutes and the other programs for which responsibilities to Indian tribes exist.

Comment: The IWG believes that it is critical to identify resources in the budget process that will be directed to Indian-related activities. The IWG recognizes that full identification of resource needs is not yet possible. That there is an existing level of need is apparent. however, and the Agency needs to begin to address this problem through the formal budget process.

7. The media program offices should make resources available to bring the existing pilot projects to successful closure.

Comment: Four regions have pilot projects, and where additional funds will be needed to reach successful closure the regional offices have requested these funds from the relevant program offices. So far no funds have been made available. The IWG believes that the media program offices should make necessary funds available to bring these pilot projects to a successful conclusion.

8. Submit the proposed "Report to the Congress: Hazardous Waste Sites on Indian Lands/Superfund Amendment" as an interim report, and proceed to carry out a more comprehensive and accurate survey as required by the statute.

Comment: While the states have been seeking out potentially hazardous waste sites for eventual review, this activity has not been performed on Indian reservations. The only survey that has been performed was the survey that is being used as a basis for the Congressional report. This survey covered only 25 reservations. The IWG believes the statute calls for more than this, and that the Agency should make a good faith effort to survey Indian reservation lands for the existence of potentially hazardous abandoned waste sites. This activity should occur in consultation with the tribes, as called for in the statute, and in consultation with the Department of the Interior, as called for in the executive order implementing the Superfund Amendments Reauthorization Act. The recently developed report should be submitted in view of the statutes deadline, but should contain a commitment to perform a more comprehensive strategy.

9. Recognize that it is the exclusive role of the courts and the Congress to resolve jurisdictional disputes when they arise, and implement EPA's programs in strict accordance with these determinations. Where there is doubt, EPA should act to implement the program based on a valid tribal assertion of jurisdiction.

Comment: As the tribes apply for regulatory programs, the Agency will encounter areas of conflicting jurisdiction; this is especially likely between a tribe and a state. While we can consult with the Department of the Interior, neither DOI nor EPA can confer jurisdiction. The IWG believes that the agency should support reasonable tribal claims, especially for jurisdiction within the exterior boundaries of a reservation.

RECOMMENDATIONS OF THE EPA INDIAN WORK GROUP

NOVEMBER 17-19, 1987

CHICAGO, ILLINOIS

The following recommendations were adopted by the EPA Indian Work Group at its November 1987 meeting. General or multi-office recommendations are presented first, followed by some specific recommendations for the Office of Water and the Office of Solid Waste and Emergency Response. In addition, the IWG passed a resolution commending Mac Weaver of Region 6 for his many successful efforts in working with Indian tribes in that region.

1. Statutory amendments that are proposed by EPA should include a timeframe within which implementing regulations must be developed. The IWG believes that 18 months is a reasonable amount of time for this activity.

   Such amendments should also direct the Agency to develop set-asides. Such set-asides should not create a cap for funding available for tribes.

2. The Agency should initiate development of generic regulations that would enable implementation of the Clean Air Act and the Resource Conservation and Recovery Act on reservations in the near term and without statutory amendment.

3. The IWG recommends that OFA evaluate media program adherence to the Administrator's direction to develop funding set-asides for FY 88 and report the results to the IWG and to the Administrator.

4. The IWG commends the Office of Water for its assertive approach in implementing the requirements of the recent Clean Water Act and Safe Drinking Water Act Indian amendments.

5. The IWG recommends that the Report to Congress that is being prepared pursuant to the Water Quality Act of 1987 present a strategy to develop a program to implement the wastewater treatment construction grants program with tribal governments rather than a formal and set program at this time.

6. The Office of Emergency and Remedial Response (OERR) should initiate, on an accelerated schedule, an outreach program to explain the Superfund program to the tribes and solicit tribal comments on OERR's proposed strategy for including tribes in the Superfund program.

    a. The outreach program must go beyond mailings, and include face-to-face meetings with tribal representatives.

    b. The proposed strategy should be presented to the tribes as a draft strategy rather than interim final. Since the strategy is guidance and not a regulation, the IWG is confident that regions can begin to implement it subject to possible future revision as a result of tribal recommendations.

7. The Office of Emergency and Remedial Response should consult with tribal representatives in the development of guidance and outreach materials that are to be sent to tribes.

8. Because of the historic lack of involvement in the Superfund program of Indian tribes, the IWG strongly recommends that the current Hazard Ranking System (HRS) be used to score potential sites on Indian lands until a new HRS is promulgated. There should be no hiatus in scoring these sites.

9. As soon as possible and in consultation with tribal representatives, the Office of Emergency and Remedial Response should develop and initiate implementation of a strategy to ensure that the requirements of Title III of SARA for hazardous material and chemical reporting and local community contingency planning are met on reservation lands.

10. The Office of Emergency and Remedial Response, in conjunction with the Federal Emergency Management Agency, should develop and implement a strategy for making emergency response and contingency planning training available to Indian tribes that do not choose to work through state government programs. An outreach program should be established to ensure that tribes take advantage of the funding that will become available 4/1/88.

11. The Office of Solid Waste should develop a strategy for ensuring that the Resource Conservation and Recovery Act is implemented on Indian reservations. Strategy development should be tracked through the Administrator's Action Tracking System. As resources allow, technical assistance should be provided to tribal governments in order to develop solid waste management plans for reservation lands under Subtitle D.

    Further, OSW should ensure that Subtitle C is being fully implemented by EPA on reservations. This activity should be included as a reportable measure in the SPMS system.

12. The IWG commends the progress that has been made in developing a strategy for implementing RCRA Subtitle I on Indian reservations and encourages the Office of Underground Storage Tanks to complete and issue its strategy and begin implementation as soon as possible.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RECOMMENDATIONS OF THE EPA INDIAN WORK GROUP

APRIL 13-15, 1988

WASHINGTON, D.C.

The following recommendations were adopted by the EPA Indian Work Group at its April 1988 meeting. The EPA Indian Work Group respectfully requests that:

1. A briefing be held for the Administrator and Deputy Administrator at which the media program Assistant Administrators present the status of implementation of their program-specific strategies to implement the EPA Indian Policy and the status of the program funding set-asides that the Administrator requested be initiated in FY 1988.
2. The Emergency Preparedness Staff of the Office of Emergency and Remedial Response, in coordination with the Office of General Counsel, develop an Agency position regarding the extent of EPA's obligation to Indian tribes under Title III of the Superfund Amendments Reauthorization Act.
3. The Office of Underground Storage Tanks, in coordination with the Office of General Counsel, develop an Agency position regarding the extent of EPA's obligation to Indian tribes under Title I of the Resource Conservation and Recovery Act.
4. The Office of Solid Waste meet with the Indian Health Service, the Bureau of Indian Affairs and the Department of Housing and Urban Development in order to determine and coordinate federal authorities concerning solid waste disposal on Indian reservations.
5. The Office of Solid Waste, in coordination with the Office of General Counsel, determine a strategy that will guide the Agency in implementing Subtitle D of the Resource Conservation and Recovery Act on Indian reservations, and that the Agency actively pursue amendment of that statute to facilitate treatment of tribes as states.
6. The Office of Emergency and Remedial Response actively pursue a program for training tribes to identify and report potential hazardous waste sites, a commitment made by the Agency in its Report to Congress on Hazardous Waste Sites on Indian Lands.
7. The Office of Radiation Programs meet with the Department of Housing and Urban Development, the Bureau of Indian Affairs, and the Indian Health Service in order to determine and coordinate federal authorities concerning remedial efforts needed to address identified radon problems in housing on Indian reservations.

CONCURRENCES

[illegible]								
SURNAME								
DATE								

EPA Form 1320-1 (12-70)

OFFICIAL FILE COPY

8. The Office of Toxic Substances work with the Bureau of Indian Affairs to determine the status of its program to identify and address asbestos in schools on Indian reservations.

9. The Office of Pesticide Programs determine how well the Federal Insecticide, Fungicide and Rodenticide Act is being implemented on Indian reservations, especially with regard to potentially dangerous misuse of pesticides on or near Indian lands and, if necessary, develop remedial strategies for compliance.

10. The Office of Water modify its proposed grant regulations under the Water Quality Act of 1987 so as to establish a set-aside for tribes of 3%, with a reallocation process, instead of the current language providing for up to 3%. Further, the Office of Water convene a regional/headquarters workgroup to develop a regional allocation formula for this set-aside.

11. The Office of Air and Radiation request the Office of General Counsel to complete its review of options for approving tribal implementation plans under the Clean Air Act and then move with all deliberate speed to act on those tribal implementation plans already submitted to the Agency.

12. The Office of Human Resources present for Senior Executive Service members one or more sessions to explain the unique governmental and cultural status of Indian tribes as that status affects environmental issues and implementation of the federal environmental statutes on Indian lands.

13. The Office of Administration, in coordination with the Office of the Comptroller and the Office of General Counsel, determine the feasibility of integrating media program funds in order to provide consolidated grant funds for Indian tribes.

AM:am:4-19-88AM DISK K

NATIONAL INDIAN WORK GROUP
APRIL 19-21, 1989
WASHINGTON, D.C.

The National Indian Work Group, having met with the media-program Assistant Administrators or their designees, has the following recommendations for the Administrator to further implementation within EPA of its 1984 Indian Policy.

1. The IWG appreciates the attendance at its meeting of Victor Kimm, Acting Assistant Administrator for Pesticides and Toxic Substances, and his staff. As discussed at the meeting, the group encourages OPTS to determine the need for pesticide enforcement on those reservations where the Agency has not supported tribal enforcement programs. The group further encourages OPTS to issue policy or otherwise communicate to its regional staff that such work is a legitimate program function, despite the constraint of current resource levels.

2. The IWG appreciates the attendance at its meeting of Jonathon Cannon, Acting Assistant Administrator for Solid Waste and Emergency Response, and his deputy office directors. As discussed at the meeting, the group encourages OSWER to perform an integrated survey on reservation lands to determine the prevalence of open dumps, landfills, hazardous waste sites, and underground storage tanks. The group further encourages OSWER to issue policy or otherwise communicate to its regional staff that technical assistance to American Indian tribes is a legitimate program function, despite the constraint of current resource levels. Finally, the group encourages OSWER to actively pursue amendment of the Resource Conservation and Recovery Act to include the participation of Indian Tribes.

3. The IWG appreciates the attendance at its meeting of William Whittington, Acting Deputy Assistant Administrator for Water, and his staff. As discussed at the meeting, the group encourages OW to pursue additional resources in order to provide adequate technical assistance to tribal environmental programs as they develop water management capabilities for Clean Water Act and Safe Drinking Water Act programs. The group further encourages OW to revise its method of allocating regional funds under section 106 of the Clean Water Act, and to assess the need for such funding and the adequacy of current funding levels to meet that need.

4. The IWG appreciates the attendance at its meeting of Ray Cunningham, Director of the Office of Program Management Operations in the Office of Air and Radiation, and OAR staff. As discussed at the meeting, the group encourages OAR to actively pursue completion of radon surveys on reservation lands, and to work with other federal agencies to develop approaches for additional testing or mitigation, as needed. The group recognizes OAR's commitment to amending the Clean Air Act, and encourages OAR to pursue that goal. The group further encourages OAR to assess the need for section 105 programs on Indian reservations and the adequacy of current funding levels to meet that need.

5. The IWG encourages the Office of Federal Activities to work with the Office of Administration and Resources Management to pursue funding from the media program offices to support multi-media circuit riders to provide hands-on technical assistance to tribal environmental staff.

6. The IWG requests the Office of Administration and Resources Management to investigate the feasibility of using consolidated grants with Indian tribes, and to report the results of this investigation at the next meeting of group in October.

7. The IWG requests that the Office of Policy, Planning and Evaluation integrate tribal governments into the implementation of the Agency's initiative for Pollution Prevention. The current environmental status of many Indian lands, and increasing development pressures, would appear to make this a unique opportunity to institute pollution prevention programs.

ATTACHMENT 6

RESPONSE FROM WILLIAM A. WHITTINGTON

Hearing Question: " Is there any need to amend the present Clean Water Act to bring about greater ease in implementation?"

Hearing Answer: "My personal opinion is that there are things that would have made implementation easier and I will submit them in writing as requested."

Following is Mr. Whittington's written response:

1. EPA is at the early stages of implementing section 518 of the Clean Water Act. Although there are some difficulties we are facing while moving ahead with the section 518 requirements, there is no pressing need to amend the statute to improve implementation at this point. However, as we continue with implementation my view about the need to amend the Act may change.

2. Currently, each of EPA's program grant authorities is tied to a particular medium. The Office of General Counsel is examining whether, within the constraints of existing grant authorities, tribes may be given flexibility to move funds between programs. Such flexibility would increase tribal ability to establish effective environmental programs.

3. The Safe Drinking Water Act provided the Administrator with authority to determine those provisions which were appropriate for tribes to administer as States. In addition, the Administrator was authorized to develop other means for administering those provisions deemed inappropriate. It would have been useful for the Administrator to have this same explicit authority in section 518 of the Clean Water Act.

4. We have found tribal pilot projects made under the construction grants program to be very helpful in demonstrating how the established grant process is working and to work out implementation issues. A specific provision for pilot projects under section 518 would have been helpful, although we have now moved beyond the need for such a provision.

5. Explicit authorizations for all of the section 518 Clean Water Act programs, as was done under Title II of the Act, would have improved EPA's delivery of these funds.

STATEMENT OF

EVERETT R. RHOADES, M.D.

Mr. Chairman and Members of the Committee:

I am Dr. Everett R. Rhoades, Director of the Indian Health Service (IHS). I am accompanied by Mr. Bill F. Pearson, Associate Director, Office of Environmental Health and Engineering, IHS. We are pleased to be here today to discuss with you IHS' involvement in the implementation of Environmental Protection Agency (EPA) programs.

The goal of the IHS is to raise the health status of approximately 1.4 million American Indian and Alaska Native people to the highest possible level. In order to achieve this, IHS has a multipurpose mission: to provide or assure the availability of high quality, comprehensive, and accessible health and environmental services; to empower Indian communities to take individual responsibility for individual wellness; to provide increasing opportunities for Indians to administer their own programs; and to serve as a health advocate for Indian people. As part of this mission, the IHS is committed to promoting a healthy environment including monitoring and assisting in the resolution of any environmentally-related health hazard. These efforts were endorsed by the Congress in the Indian Health Care Amendments of 1988 when it reaffirmed the primary responsibility and authority of the IHS to provide the necessary sanitation facilities and services.

For years, the EPA and IHS staffs have coordinated their activities in Indian country through formal and informal agreements, as well as extensive dialogues at the Headquarters and field levels. The IHS network of professional staff on or near Indian lands through its long standing policy of Indian self-determination and government-to-government relationships has enabled the IHS to include Indian people in discussions of environmental issues. This approach has been informative and helpful in addressing problems and concerns of interest to both agencies.

The tribes are key partners in the coordination of environmental activities as they too are encompassed by, and must comply with, all Federal environmental laws. Additionally, they are affected by applicable, adjacent State and local environmental laws. Most environmental laws regulate various activities or environmental conditions which have an impact on health. For example, they regulate the provision of safe drinking water and the use of pesticides. Because EPA has primary responsibility for administering and enforcing (primacy) all environmental laws, EPA's regulatory programs affect a variety of activities and environmental conditions on Indian reservations. Since the primary purpose of the IHS is to protect the health of, and prevent disease among, the American Indian and Alaska Native people, IHS has developed and implemented a comprehensive environmental health program for many years. This program includes surveillance of many regulated tribal and Federal environmental health activities and many non-regulated environmental conditions and activities affecting health, as well as technical assistance and training to help improve any adverse conditions found. An example of a regulated activity, is the assurance of quality of a community water supply. An example of a non-regulated activity may be assurance of the quality of a home water supply.

Thus, the programs of both agencies overlap but generally that overlap is focused on those regulated environmental activities and conditions on or near

Indian reservations which affect health conditions as opposed to economic, or other conditions. Additionally, tribes may be involved in a broader array of environmental activities of interest or concern to both agencies. The environmental health roles of both agencies and the tribes, on Indian reservations, are most clearly explained by describing their respective responsibilities for (1) enforcement of environmental laws, (2) technical assistance and training in environmentally related areas, (3) environmental problem identification and evaluation, and (4) mitigation of such problems. The various roles may be summarized as follows:

Enforcement of Environmental Laws

IHS IHS has no enforcement authority and does not assume nor undertake any regulatory/enforcement duties or responsibilities. Historically the IHS has served extensively as an advocate and technical resource to assist tribes in their efforts to comply with environmental laws and in the development of codes and ordinances which address environmental concerns. This assistance has frequently included funding.

EPA The EPA's primary role is that of a regulatory agency. Thus EPA establishes and enforces pollution standards, or oversees State, tribal, and local government efforts to carry out environmentally related regulatory activities. Examples of enforcement mechanisms are civil suits against polluters, citizen suits, etc. Under recent amendments to the Safe Drinking Water Act and the Water Quality Act, EPA is authorized to delegate, to tribes, some primary enforcement responsibilities to be exercised within their own reservations. This is similar to EPA's delegation of enforcement responsibilities to States.

Tribes Tribes can establish and enforce their own environmental laws. Tribes can also request, and be delegated by EPA, some primary enforcement responsibilities of Federal laws, if their environmental standards are as strict, or stricter than national standards set by EPA.

Technical Assistance to Tribes

IHS Historically, the IHS has conducted, or supported most of the initial training related to the operation and maintenance of tribal sanitation facilities. On many occasions, IHS has also joined with EPA to provide instruction to tribal water and sewer system operators. Because of the recent major amendments to the Safe Drinking Water Act (SDWA) and the Clean Water Act (CWA), and the increased awareness of hazardous wastes, solid waste, asbestos, and radon, IHS is taking a more active role in coordinating meetings between IHS, EPA, and the tribes to disseminate information. IHS provides information and technical assistance on all aspects of regulated and non-regulated environmental health subjects based upon problems identified through surveillance activities and at a tribe's request. This IHS assistance is subject to resource limitations and capabilities.

EPA Many EPA Regional offices have undertaken active roles in and supported such activities as technology transfer; instruction of tribal members on new laws, regulations and programs; training in operation and maintenance of tribal sanitation facilities; assistance/training in environmental program development and management; and technical assistance during emergency situations. Because of limited staff and great distances from EPA offices to remote Indian reservations, EPA has accomplished most of its training and other technical assistance through use of contractors and has transferred some funds to IHS for the conduct of cooperative training activities. Technical assistance by EPA is authorized by the SDWA and CWA and is available to tribes now that they are to be treated as States, as required by recent amendments.

Environmental Problem Identification and Evaluation

IHS IHS does not perform routine sampling or testing of water or wastewater for the tribes because these activities are considered to be an integral part of the operation and maintenance of sanitation facilities, i.e., a tribal responsibility. However, if IHS suspects that a significant hazard to human health exists, our staff will collect samples, conduct analyses, and make evaluations and recommendations. In addition, IHS with the help of EPA is sampling and evaluating radon concentrations in Indian homes in several Areas. Because IHS personnel are located on or near Indian reservations, and frequently work in Indian communities, they often collect water samples for EPA. Through IHS surveillance activities, or at the request of tribes, they help identify solid waste, hazardous waste, asbestos, or radon problems and to make recommendations for alternate ways to address any problems.

EPA Pursuant to both SDWA and CWA authorities, EPA can provide limited funds to tribes for environmental management development so that tribes can become knowledgable and capable of conducting routine surveillance and monitoring. EPA also provides some funds to tribes, IHS (Indian health issues only), or contractors for (non-routine) baseline sampling/testing for all forms of pollution under Memorandum of Agreements (MOA) between IHS and EPA. Although typically EPA doesn't have the staff to obtain samples directly, they will review test results and make evaluations and recommendations.

Tribes The tribes, as owners/operators of sanitation facilities, are required to perform routine monitoring in compliance with applicable laws. Both the IHS and the EPA encourage and assist tribes in assuming such environmental management roles as problem identification and evaluation.

Mitigation of Environmental Health Problems

IHS IHS participates in activities that clean or protect the environment only when these activities are related directly to human health problems. Other than P.L. 86-121 funds for construction of water, wastewater, or solid waste facilities, the IHS receives no specific appropriations with which to mitigate adverse environmental conditions; however, when necessary, funds are obtained from the hospitals and clinics or sanitation accounts for emergency health hazards.

EPA With few exceptions, (notably providing grants under the CWA for building wastewater treatment facilities and under Superfund for cleaning up hazardous waste disposal sites) the EPA does not have funds or perform activities that directly clean or preserve the environment. However, EPA participates indirectly in mitigation through enforcement activities.

Tribes The tribes are inherently responsible for mitigating environmental health problems on their reservations. They are also available to administer Federal environmental responsibilities and authorities in enhancing and achieving environmental goals. They may seek and receive some funds from EPA and/or IHS programs, as described above, and often seek resources elsewhere.

The roles of EPA, the tribes, and IHS, explained above, and the Federal/tribal relationship regarding environmental issues are constantly being reviewed at the local level where environmental concerns arise and solutions must be identified. As each responsible group performs its respective role and as we continue our cooperation and coordination, we can expect the existing relationships on environmental matters to grow. I am pleased with our actions and results to date and do not expect anything less in the future.

That concludes my opening statement, Mr. Chairman I will be happy to try to answer any questions you or the other Committee members may have.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Public Health Service

Indian Health Service
Rockville MD 20857

AUG 28 1989

The Honorable Daniel K. Inouye
Chairman, Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Mr. Chairman:

I am responding to your letters of July 17 and July 19 requesting answers, in writing, to 29 questions concerning environmental issues of concern to Indian tribes. These questions were submitted to supplement those asked during the July 23 hearing of the Select Committee on Indian Affairs. Answers to your questions are provided in the enclosure.

I trust this information is helpful. We appreciate the opportunity to participate in your review of environmental issues in Indian country. A similar letter is being sent to Senator McCain.

Sincerely yours,

Everett R. Rhoades

Everett R. Rhoades, M.D.
Assistant Surgeon General
Director

Enclosure

Enclosure for letter to the Honorable Daniel K. Inouye

The following answers to 27 questions are provided in response to your July 17 request for additional information on environmental issues of concern to Indian tribes. These answers supplement information provided during the June 23 hearing of the Senate Select Committee on Indian Affairs.

Question: 1. How many IHS constructed landfills on Indian lands are not in compliance with current regulations?

Answer: Since 1959, with the enactment of the Indian Sanitation Facilities Act, the Indian Health Service (IHS) has constructed 108 tribally owned landfills on Indian lands. The IHS did follow Public Health Service (PHS) landfill guidelines at the time those landfills were constructed. Subsequently, since the formation of EPA in 1970, more stringent requirements have been developed. It should be noted that, to be in compliance with current EPA and other applicable regulations, proper operating standards must be followed in addition to compliance with construction requirements. Only two of these landfills remain in compliance at this time.

Question: 2. When EPA regulations requiring groundwater monitoring and other measures go into effect in 1990, how many IHS constructed landfills will comply with these regulations?

Answer: If the proposed 1990 EPA regulations go into effect, it is anticipated that one IHS constructed facility will be in compliance.

Question: 3. What is the estimated cost for bringing IHS constructed landfills into compliance with the 1990 regulations?

Answer: A cost estimate for bringing IHS constructed landfills into compliance with the proposed 1990 EPA regulations cannot be determined until the design requirements are finalized. The diversity of these potential design requirements at the State and Tribal level preclude a refined cost estimate. Such requirements are needed so the facilities can be evaluated and judged with respect to their compliance with the regulations. At that point, a large committment of time and resources would be required to estimate the costs accurately.

A very preliminary estimate of the cost to upgrade IHS constructed landfills, which are Tribally owned, to meet proposed 1990 regulations is $67.8 million. In addition, it is also estimated that existing solid waste disposal sites on Indian lands developed by tribes or other non-IHS entities would cost approximately $45.3 million to close, or upgrade to meet the 1990 regulations. This estimated total of $113.1 million would be the minimum required for solid waste facilities in Indian country.

It should be noted that, although approximately 35 percent of this total estimated need is for Alaska, there will be many villages, perhaps as many as 100, where permafrost, high groundwater, lack of roads, lack of regional facilities to accept solid wastes, and high operational costs, will make it extraordinarily expensive, perhaps totally infeasible within the conventional norms, to meet the new regulations.

Question: 4. How many wastewater treatment facilities can be constructed with the available IHS and EPA funds through 1990?

Answer: All available IHS funds are already committed for water, wastewater, and solid waste facilities projects, and for operation and maintenance training and equipment. Currently the IHS is expanding several community wastewater treatment facilities to accommodate new HUD and tribal housing projects. The IHS also expects to construct over 1000 individual wastewater treatment facilities for existing Indian homes and for new Indian homes planned or under construction and scheduled for completion through 1990.

Under the EPA Indian set-aside program, there are four wastewater treatment projects underway that probably will be completed by the end of 1990. The EPA will be making additional grants this year, but it is doubtful that construction of wastewater facilities funded with those grants will be completed by the end of 1990.

Question: 5. What steps has IHS taken to bring sanitary landfills on Indian lands into compliance with EPA regulations?

Answer: There are over 650 sites on Indian land where solid waste is deposited. As previously mentioned 108 of these were constructed by IHS and are now owned by the Tribes. Many of the remaining sites are nothing more that depressions in the terrain where solid waste has been indiscriminately dumped for several years. Most of these solid waste "dump" sites definitely are not operated as sanitary landfills and thus are not in compliance with EPA regulations. The IHS has surveyed approximately 450 of the waste disposal sites within the last two years, has provided technical assistance to the tribes, and has advised them either to close the sites or manage them to best protect the public health. Under the authority of Public Law 86-121, the Congress has appropriated funds for the provision of sanitation facilities, including solid waste disposal systems. However, considering the limited availability of funds, the IHS and tribes most often have given priority to water and sewer facilities. The IHS has also provided assistance to the tribes in the preparation of project documents for funding through the Housing and Urban Development (HUD) Community Development Block Grant (CDBG) program for solid waste facilities.

Question: 6. Have you assessed the need to train operators of wastewater treatment plants for Alaska Native villages and tribes and do you have a program to meet those needs? What percent of your Alaska budget is earmarked for training? Are there geographic areas in which you are not addressing training needs in Alaska?

Answer: In 1975 the IHS Alaska Area Native Health Service Environmental Health and Engineering Branch established a Planning and Training Unit (PTU). The PTU's primary responsibility is to provide technical assistance and training to Native utility system operators and local government representatives. There are 10 personnel within the PTU assigned this responsibility full-time. Two others share the Operation and Maintenance (O&M) responsibility with other assignments but account for one additional full time equivalent devoted to O&M. Approximately 17 percent of the Branch's program budget of $4.0 million is spent in this area. In addition, PTU personnel work very closely with the Alaska Safe Water Program. Under this Program, Remote Maintenance Workers (RMW's) provide technical assistance and training to village operators. The PTU staff provides training to RMW's and technical support on a regular basis. To ensure State-wide coverage, PTU O&M specialists concentrate their village assistance activities in the areas not covered by the RMW's.

Question: 7. How do you coordinate with other agencies to meet training needs? Do you obtain funding from other agencies to assist you in your efforts?

Answer: The training and resources to meet these needs are identified by the tribes and IHS. The EPA and IHS work closely at the Headquarters and Regional/Area Office levels and with States, in some instances, to maximize the benefit of their combined resources to provide formal training. In addition to IHS funds, other agencies provide funds at various times for selected water or waste disposal programs. For example, EPA has provided funds to support training programs and travel expenses associated with the training of tribal utility O&M employees. The EPA has also provided funds to IHS to hire temporary employees to perform "hands-on" training at tribal facilities. The latter effort is similar to the "Circuit Rider" program administered by the National Rural Water Association (NRWA) which receives a major portion of its funding from the Farmers Home Administration. The NRWA also provides some technical assistance to operators of Indian-owned systems and IHS maintains an awareness of their activities in order to avoid duplication of these efforts. IHS training is for health related purposes and augments EPA training which is primarily from a regulatory aspect.

Question: 8. What percent of a health sanitarian's time is devoted to individual house-to-house training on personal hygiene and use and maintenance of water or wastewater systems?

Answer: We estimate that IHS sanitarians spend between 5 and 10 percent of their time providing house-to-house training on individual sanitation facilities. Community health representatives, environmental engineers and others also participate in this type of training. The IHS Environmental Health program provides comprehensive environmental health services which vary from Area to Area in order to address specific Area needs. Many Areas provide homeowner training to recipients of new HUD homes. This is usually done at group sessions, however, Areas will provide technical assistance to individuals at the homeowner's request. A greater emphasis is placed on working with tribal utility organizations to upgrade their services than providing services directly to individuals.

Question: 9. What funding do you have for sanitation projects that are not connected to HUD projects? What percent of the total estimated needs do these funds meet?

Answer: The FY 1989 Sanitation Facilities Construction Appropriation of $42 million provided $32 million to serve non-HUD new or renovated Indian housing and $10 million to serve existing Indian homes and communities. These amounts addressed approximately 80 percent of the Indian homes constructed or renovated in FY 1989. At the end of FY 1988, the estimated cost to address the identified sanitation facility deficiencies for existing Indian homes was $675 million. The funds available to address the needs of existing homes and communities during the last six years represent approximately two percent of that required. A recent funding history for the program is as follows:

SFC FUNDING (Thousands)

Fiscal Year	To Serve Existing Homes	To Serve New And Renovated Homes
1979	0	50,640
1980	0	46,240
1981	0	49,950
1982	0	38,680
1983	28,000	25,000
1984	0	21,000
1985	0	24,500
1986	0	24,601
1987	0	19,988
1988	5,000	25,000
1989	10,000	32,000
Total	$43,000	$357,599

Question: 10. Do you consider a tribe or village's ability to operate and maintain a system in determining whether to construct a project in a community or in deciding what kind of wastewater treatment project to construct?

Answer: In P.L. 100-713, the Indian Health Care Amendments of 1988, the Congress directed that the "...financial and technical capability of an Indian tribe or community to safely operate and maintain a sanitation facility shall not be a prerequisite to the provision or construction of sanitation facilities by the Secretary." The IHS does pay considerable attention to the operation and maintenance capability of a tribe or village so that only the most appropriate technology, which meets EPA or other applicable regulations, is provided. The objective of the program is to provide long-term health benefits and therefore it is essential that consideration be given to the resources available for long-term operation and maintenance by the tribe, village, or homeowner.

Question: 11. Do you provide wastewater plant operating costs for a tribe or village? How do you ensure that once a system is built that the tribe or village can afford to operate and maintain the system?

Answer: The IHS does not operate or maintain any tribal sanitation facilities nor does the IHS provide funds to tribes for such purposes. The IHS makes a concerted effort to design wastewater facilities that the tribe or the homeowner can afford. Before a project is approved, IHS estimates the cost of operation and maintenance of the proposed facilities and presents this information to the tribe. The tribe, village, or homeowner must agree to operate and maintain the facilities upon project completion. The IHS has found through experience that tribes that collect user fees for utility services generally can better afford to operate and maintain their systems. The IHS provides technical assistance to tribes before, during, and after project construction to establish user fee schedules and preventive maintenance procedures. The IHS also uses approximately $250,000 annually from the SFC appropriation to fund emergency projects often related to untimely equipment failures which must be addressed if the Tribes are to operate and maintain their systems successfully.

Question: 12. How do you assist tribes and villages which are having difficulty in keeping their systems running due to lack of financial or budget or accounting experience?

Answer: Periodically the IHS, with assistance from EPA and others, provides operator training courses which cover this topic. However, these efforts are not comprehensive, annual activities for all tribes in all Areas. The IHS provides this assistance when resources are available and directs the services to communities which are considered to have the greatest need, or where direct requests from the tribe/community have been received. Additionally the IHS has provided assistance to tribal government staff in water and wastewater system funds management. The IHS also encourages tribes to seek the assistance of certified public accountants, financial consultants and other tribal entities having strong administrative capabilities.

Question: 13. What percent of your budget is used for research and development of new or improved technologies which would work in rural Alaska?

Answer: The IHS has no source of funds specifically designated for research and development of sanitation facility technology. However, in the normal course of designing and constructing sanitation facilities for rural Alaska, many innovations and improvements have been developed out of necessity. This has happened as conventional state-of-the-art designs were found to be unsuccessful in Alaska. Most IHS SFC projects in Alaska have been part of a continuum of applied research and development. A notable example is the insulated pipe currently used for arctic sanitation facilities. Our engineers developed this material from concept to installation. There have been numerous changes in this product over the years as experience has identified possibilities for improvement.

Also, for many years, engineers in the Alaska program have worked closely with their counterparts in Canada and other arctic countries to share technology related to the provision of utilities in the north. Some of this technology transfer has been sponsored by the World Health Organization. In 1979, several of our Alaska engineers were involved significantly in the development of a Cold Climate Utilities Manual which was published by the EPA. In 1986, a rewrite of the manual was published by the Canadian Society of Civil Engineers. Again, several of the manual sections were authored, up-dated, and/or edited by IHS engineers.

Question: 14. According to your assessment, what number of Alaska villages are at each deficiency level as defined in P.L. 100-713? What would the costs be to remedy those deficiencies? What percent of the national need does this represent?

Answer:

Def. Level	No. of Villages	Cost
1	12	$ 1,018,000
2	67	$25,640,000
3	80	$77,390,000
4	38	$39,076,000
5	5	$ 2,278,000
Total	202	$145,402,000*

*This cost represents approximately 21.5 percent of the identified national need. This would raise all facilities to a minimum of deficiency level III.

Note: The costs shown above, by deficiency level, represent estimates to provide financially feasible sanitation facilities with improved public health protection. They do not represent the cost necessary to raise the level of service in each community to that associated with the standard level of service expected by most Americans. Many Alaska villages do not have water supply and waste disposal services at each home and, given the costs of constructing and operating such facilities, that level of service is not practicable in the near future. If the accepted norm of having piped service to each home were to be applied to Alaska communities, the cost estimate would be several times the total amount shown above.

Question: 15. Are national standards used in your assessment? If not, what would the costs be to meet needs on the basis of national standards?

Answer: Except as noted in the answer to Question 14 pertaining to Alaska villages, all applicable Federal regulatory standards are used in IHS' assessment of sanitation facility deficiencies in Indian country. As a result of the Safe Drinking Water Act Amendments of 1986 and the Water Quality Act of 1988, these EPA and other applicable standards are now being revised and generally are being made more stringent. As the new regulations are promulgated, IHS will reassess tribal sanitation deficiencies. Undoubtedly, new EPA and other applicable regulations will increase the cost of correcting these deficiencies.

Question: 16. What percent of your sanitation construction budget has been allocated to Alaska over each of the past five years?

Answer: Of sanitation construction funds appropriated for IHS, Alaska has received the following amounts:

Fiscal Year	Amount	Percent
1984	$4.664 million	22.2
1985	$5.205 million	21.2
1986	$4.386 million	17.8
1987	$4.928 million	24.7
1988	$6.290 million	21.0
Total:	$25.47 million	21.2

Additionally during this five-year period, the IHS has received (for Alaska) $1.8 million in HUD CDBG funds from Villages, $22.35 million from HUD for offsite water and sewer facilities to serve HUD homes, and $19 million in contributions from Villages, most of which are funds allocated by the State of Alaska.

Question: 17. How is the Alaska budget allocated between administration and construction?

Answer: As in all other Areas, permanent Alaska Area staff are funded from the Indian Health Service appropriation, not the facilities construction appropriation. The IHS sanitation program budget provides for salaries, benefits, travel, and other support costs for managers, engineers, other health professionals, and administrative support staff. Construction funds are used exclusively for activities associated with actual project design and construction. A limited amount of project funds (less than 12 percent) is used for support functions directly related to project activities. These include technical, clerical, and logistical services specifically related to the design, construction, and training functions necessary for all projects.

Question: 18. How do you coordinate with other federal agencies (BIA, HUD, DOE, EPA, FEMA, HHS) to ensure a unified approach to meeting the needs of Alaska villages and tribes in the lower 48? How effective has such coordination been?

Answer: The IHS attempts to coordinate the provision of sanitation facilities and training with the activities of other Federal agencies to the greatest extent possible at all levels. For many years an emphasis has been placed on interagency coordination on sanitation facilities related Indian issues through development of interagency agreements, routine coordination meetings, and agency contacts. In Alaska, there is a continuous dialogue among IHS, HUD, EPA, and the State of Alaska Village Safe Water Program to ensure well coordinated efforts. Efforts by IHS and HUD to provide sanitation facilities for HUD homes, in general, have been well coordinated and effective. Coordinated efforts by IHS and EPA to provide training have increased in the last two years resulting in a very effective unified approach.

Question: 19. How many communities have had their IHS designed and constructed wastewater treatment facilities replaced or modified within five years of construction and initiation of operation? How do you account for this?

Note: In responding to this question, and after consultation with committee staff, IHS is providing the answer for the period from 1979 to present. This limitation to the past 10-year period enabled us to answer more accurately within the allotted response time.

Answer: During the most recent ten-year period, the IHS and tribes jointly have constructed approximately 500 community wastewater treatment facilities. After constructing those projects, facilities in approximately 50 communities were modified or enlarged within five years of being placed into operation. Approximately 75 percent of those modifications were expansions to accommodate community growth, primarily new HUD housing. Ten percent of the modifications were required to seal sewage lagoons adequately so that seepage would be prevented and to facilitate proper treatment in accordance with improved state-of-the-art designs. Six percent of the upgrades were required to enable the facilities to meet new EPA discharge requirements. The remaining 9 percent were modified for a variety of reasons ranging from cultural concerns to problems related to inadequate maintenance.

Since 1982, funds to construct sanitation facilities for HUD homes have been provided by HUD and the funding is restricted to very tightly controlled "unit cost" figures. This funding mechanism and the restrictions on funds do not lend themselves to proper planning and design for an infrastructure to accommodate growth. Development, funding, and construction of sanitation facilities are addressed more effectively and efficiently if based on a total community development concept rather than on intermittently developed housing project needs which reflect requirements for a HUD subdivision or portion of a community. If the developmental approach was employed, the needs of Indian families would be served better and the need for many short-term modifications would be avoided.

Question: 20. At what stage do IHS and HUD coordinate project planning activities? Is IHS involved sufficiently early in the process to ensure proper design and location for on-site systems?

Answer: Generally the coordination between IHS and HUD occurs in the initial project planning phase at the time the units are allocated. A more practical approach would be to require that planning be performed in advance of unit allocation with consideration of a more comprehensive approach to infrastructure funding. Presently the funding mechanism for sanitation facilities for new HUD homes is closely controlled by unit costs which often result in a piecemeal approach to construction leading to higher future construction costs and higher costs for tribally conducted operation and maintenance.

Question: 21. Are on-site water and sewer systems appropriate for all HUD projects or should community wide systems be considered for some locations?

Answer: On-site water and sewer systems are not appropriate for all HUD projects. For example, if HUD constructed a large subdivision it would probably be more practical to construct a single water system served by a reliable water source than to develop a well and provide a separate pumping system for each homesite. Likewise, onsite sewage systems may not be practical when soil conditions are unsuitable or the groundwater table is too close to the surface. Therefore, many HUD projects are constructed where community water and sewer systems are recommended or required by IHS. Generally, community water and waste systems are considered safer and more reliable than individual home systems unless the housing units are so widely scattered that a community system is not feasible. Futhermore, public health measures, e.g., fluoridaton, are facilitated by the provision of community systems which serve larger populations. Many factors must be considered in the final decision.

Question: 22. Are HUD homes ever constructed on locations that are not feasible for wastewater treatment on-site? If so, how often?

Answer: Yes. We estimate that approximately one-half of all HUD homes are served by community sewer facilities and one half are served by on-site facilities. This varies greatly depending on site conditions, number of units allocated, size of lot, etc.

Question: 23. Does HUD address wastewater disposal through soil absorption methods? How long do these systems typically last before they need to be replaced by another method?

Answer: Soil absorption systems are used for an estimated one-half of the HUD Indian housing units constructed recently. If properly constructed, used, and maintained these systems have an expected service life of 20 years.

Question: 24. What steps has IHS taken to identify the needs of Indian tribes and Alaska Native villages for the operation and maintenance of wastewater treatment facilities?

Answer: The sanitation facilities deficiencies list identifies needs, both in terms of capital improvements and operation and maintenance equipment, for sanitation facilities. The IHS works with local communities/villages to provide training and technical assistance and coordinates these efforts with the State of Alaska and EPA.

Question: 25. Are there funds from IHS available for O & M of wastewater treatment facilities on Indian lands or in Alaska Native villages?

Answer: There are no funds available from IHS for sustained O&M of wastewater treatment facilities on Indian lands or in Alaska

Native Villages. Since the inception of the P.L. 86-121 program, tribes and tribal entities have accepted the transfer of sanitation facilities and the responsibility to operate and maintain them. If routine operation and maintenance of sanitation facilities were deemed to be the responsibility of IHS, it is estimated that the related costs would be approximately $120 million annually. Without the authority to monitor water usage, require repairs in households, etc., these costs would continue to escalate. If the Federal Government were to attempt to control these costs, it would appear that we would be in conflict with tribal sovereignty and self determination.

Question: 26. How many Indian homes lack indoor plumbing?

Answer: The IHS estimates that there may not have been a significant decrease in the number of existing Indian homes without indoor plumbing since 1980. Based on the United States Summary of General Housing Characteristics (1980 census of housing), there were 397,250 homes occupied by Native American families in 1980 (including those in urban areas). Of these, approximately 28,900 had no home plumbing facilities in 1980. Since then, IHS has provided sanitation facilities for more than 38,000 Indian homes, mostly new and rehabilitated homes. Because of the rapid growth in the number of Native American families and the fact that many of the new homes merely permit multiple family occupancy to be reduced (e.g., one of the two families living in a house may move to a new home, but one family will usually stay in the old home without plumbing for economic reasons or because housing authorities will not allow multiple families in HUD homes), most existing homes remain occupied.

Question: 27. As you know, Committee staff will be preparing a survey of the environmental protection needs of the tribes. Please provide us with the names of any IHS employees who will be available to assist in the preparation of the survey. Please provide us with your written comments or recommendations for the formulation of the survey instrument.

Answer: The Director, Division of Environmental Health, IHS, Rockville, Maryland, telephone number (301) 443-1043, or his designee, will be available to participate in the survey.

The IHS and EPA collaborated on the formulation of two surveys of Indian sanitation facilities that were mandated by the Safe Drinking Water Act Amendments and the Water Quality Act. Also, the EPA funded a "Survey of American Indian Environmental Protection Needs on Reservation Lands: 1986," which was conducted by Americans for Indian Opportunity. These efforts have resulted in considerable experience which IHS can provide to the Committee staff in the formulation of the survey instrument.

The following answers to two questions are provided in response to your July 19 request for additional information on environmental issues of concern to Indian tribes. These answers supplement information provided during the June 23 hearing of the Senate Select Committee on Indian Affairs.

Question 1: The Pueblo of Zuni in New Mexico has advised this Committee of its attempt to get a certificate of emergency for its domestic water system. Apparently, both IHS and BIA concur in that request to the BIA headquarters here in D.C. If the request is approved, [what will] the role of each of your agencies be in addressing the serious water quality problems at the Pueblo?

Answer: The Indian Health Service (IHS) recognizes that there is a water quality problem at the Zuni Pueblo. However, based on IHS testing of the water over the last six months, IHS has determined that the water at Zuni does not present a health hazard; i.e., the water meets all EPA primary drinking water standards. The problems that do exist mostly are aesthetic, such as taste and odor. Also, three water supply wells have tested a higher than average level for radionuclides, although they are within standards.

The IHS recommends a study to conduct a comprehensive evaluation of the water and sewerage systems at Zuni Pueblo prior to provision of funds for construction. During the past three months the Bureau of Indian Affairs has arranged a series of meetings among all concerned Federal agencies, including IHS, to discuss the availability of each agency's resources for use in meeting the Pueblo's requests for a water and sewer project. Additionally, we understand that the BIA is looking for other sources of water for the Pueblo.

Question 2: The Assiniboine and Sioux Tribes of the Fort Peck Indian reservation in Montana have advised the Committee of problems involving interagency management of oil and gas development on the reservation. BIA, EPA, BLM, the Tribe, and the State of Montana are all involved in leasing, drilling, production, disposal, and closure depending on ownership of a given well. This has led to surface and groundwater problems on the reservation. Is there a plan to coordinate activities at the tribal level? Will the tribe be the lead agency, with help from BIA, IHS and EPA or should a federal agency take the lead? How will this matter be finally determined?

Answer: Generally, the IHS is not involved in the interagency management of oil and gas development on Indian lands unless notified that there is a specific public health problem. At this time, our Billings Area Office is not aware of any request from the tribes at Fort Peck for IHS to provide assistance to resolve this matter or coordinate activities with other agencies. Based on our knowledge of the situation, there are five homes, each with individual wells, that have experienced significant deterioration of drinking water quality apparently because nearby disposal wells from oil and gas operations have contaminated the aquifer. This situation appears to be a regulatory problem, which would fall under the jurisdiction of EPA. Nevertheless, within the scope of IHS' authority and resources, we will work with the tribe and other agencies to correct the problem.

STATEMENT OF PATRICK A. HAYES, ACTING DEPUTY TO THE ASSISTANT SECRETARY - INDIAN AFFAIRS (TRUST AND ECONOMIC DEVELOPMENT), DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE SELECT COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE, ON THE IMPLEMENTATION OF THE INDIAN POLICY AND PROGRAMS OF THE ENVIRONMENTAL PROTECTION AGENCY.

June 23, 1989

Mr. Chairman, thank you for the opportunity to appear at this hearing on the implementation of the Indian Policy and programs of the Environmental Protection Agency (EPA). We believe the hearings will be helpful in describing the complex problems and situations that exist on Indian lands and in describing the effort that EPA, Bureau of Indian Affairs (BIA), and other Federal agencies are putting forth in our attempts at finding solutions to these problems. We also hope these hearings will lead to a better understanding of these situations and a closer cooperation among Congress, the Indian tribes, and the Federal agencies charged with improving life on the reservations.

We defer to EPA for a detailed explanation of its nine point Indian Policy.

DEVELOPMENT OF THE EPA INDIAN POLICY

In 1984, EPA approached the Bureau and the Department of the Interior (DOI) with a draft of its proposed Indian Policy. EPA was commended on its efforts of assuring that their program became responsible to tribal self-government and for complying with the Presidential policy of dealing with tribes on a government-to-government basis.

During the remainder of the development of the Indian Policy, there were meetings and correspondence with EPA concerning various aspects of the Policy. The Department and the Bureau were fundamentally in agreement with the overall intent of the Indian Policy. The Department's main concerns were addressed in a letter to EPA dated September 6, 1984.

The major points of the Department's comments that were forwarded to EPA are as follows:

- Tribes do not have the same governmental structures as do State governments. These differences need to be recognized in order to manage programs.
- What will be the line of communication among EPA, DOI and the tribes?
- Who will represent the tribes in dealing with EPA and/or, in particular, the States? What will be the cost of these activities to the tribes?
- When tribal programs exist, enforcement concerning non-Indian lands within the reservation boundaries must be addressed.
- How will this policy be incorporated into EPA's budget?
- EPA should consider framing an agreement for joint coordination between EPA and BIA.

To its credit, we believe EPA has addressed the majority of these issues raised in the Department's letter when it implemented the Policy in 1984/1985.

The development and implementation of the EPA Indian Policy proved to be very timely. In the years that have followed, many of its laws have been reauthorized to include tribes where they were not previously mentioned. As a result, programs have been established by which tribes may obtain funding to implement their own programs on the reservations. The main laws that have been reauthorized are the Safe Drinking Water Act (42 U.S.C. 300f et seq., as amended), the Clean Water Act (33 U.S.C. 1251 et seq, as amended) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), (42 U.S.C. 9601 et seq. as amended).

The water laws contain programs for enforcement of public water systems, underground injection control, well head protection, national pollutant discharge elimination system permits, tribal water quality management grants and waste water construction grants. Under the Superfund reauthorization, EPA has determined it will be responsible for cleanup of National Priority List (NPL) sites on Indian lands. In addition, there are grants for tribal air monitoring programs, inclusion of tribes in the national household radon survey, limited assistance on solid waste management and program development, grants for pesticide applicator certification and grants to remove asbestos from Indian schools.

BIA EXPERIENCE WITH EPA AND ITS POLICY

Much of the Bureau's experience with EPA and the tribes concerns the Safe Drinking Water Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended (CERCLA). It is apparent that EPA is committed to the Policy as it has provided personnel and funding for carrying out the goals of the policy. Numerous meetings among the Bureau, EPA and the tribes concerning the various issues have been held at both the national and regional levels. The Headquarters level EPA staff has been very helpful in keeping the Bureau's Central Office staff apprised of the many developments and issues involved in implementing the environmental statutes related to Indian lands. Drafts of proposed rules and regulations are forwarded to the Bureau for comment, and meetings, if necessary, are set up for further explanation. There have been a few times when we have felt there was not adequate time to comment on the various rules concerning tribes in the reauthorization of the laws. However, this has not presented itself as a major problem. EPA has also been very helpful in the preparation of a Memorandum of Understanding (MOU) among BIA, EPA, HUD, and IHS that will define each agency's role on Indian land and also address areas of mutual concern.

BUREAU ACTIVITIES IN THE IMPLEMENTATION OF THE POLICY

The Bureau assists EPA and the tribes in carrying out the Indian policy in the areas of water quality, hazardous materials, radon, and air quality.

SUGGESTIONS FOR IMPROVING IMPLEMENTATION OF THE POLICY

The Bureau wishes to commend EPA on its Policy and efforts thus far. However, with any undertaking of this size, there will be occasions when adjustments must be made to improve the end result. The Bureau believes that two basic adjustments can be made which will greatly improve the bottom line service to the tribes. One improvement is for better notification and involvement of Bureau personnel at the Regional and Area Office levels and the other is for clearer guidance for tribes on what programs affect Indian lands, whether funding is available, and if so, how these funds may be obtained. Let me explain.

Because of the Bureau's historic involvement with Indians and Indian tribes, there are existing Bureau resources available to

EPA for interaction with the tribes. Utilization of the resources, where appropriate, would also keep the Bureau apprised of EPA actions in order that agreements may be reached early in the process.

Clarification of guidance to the tribes is very important. In a recent meeting with EPA, BIA and tribal representatives concerning potential funding to improve water delivery and sewage systems on a reservation, so much information was given by EPA personnel that both tribal and Bureau personnel left the meeting confused and disillusioned. Let me assure you that the EPA personnel present were more than courteous and helpful, but an overabundance of direction did point out the need for simplified guidance.

To improve this situation, we would like to see this guidance in the form of a chart or other graphic which would show the program, what funding is available, who the contacts are, and simplified steps involved in obtaining either the program or the assistance. Guidance can also be improved in other ways. More face-to-face contact with tribes would be preferable than simply sending out large volumes of paper to explain programs since most tribes are not set up to digest this type of information as would a state or local government. This face-to-face contact could take the form of national and regional meetings that deal with how to implement the various programs. Follow-up phone calls after written notices of such national and regional meetings have been issued would be particularly helpful to smaller tribes. Also, copies of these notices to Bureau field offices would provide the BIA with the opportunity of assisting in the notification of these meetings and assuring that the tribes with the greatest need are contacted. These types of efforts would aid EPA in better understanding the particular problems on Indian lands in order that they may better adapt their programs to these specific needs. The Bureau will be more than willing to assist EPA if it accepts these recommendations.

CONCLUSION

Again, we wish to commend EPA on its Indian Policy and program and only wish that other Federal agencies follow their lead. The Bureau is more than willing to assist EPA and the tribes in carrying out this policy. It is through this kind of cooperative spirit that we may all work together to ensure such concerns are addressed.

This concludes my prepared statement. I will be happy to respond to any questions the Committee may have.

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:

Water and Land Resources
BCCO 1494

OCT 11 1989

Honorable Daniel K. Inouye
Chairman, Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Mr. Chairman:

This acknowledges receipt of your letter dated July 17, 1989, requesting responses to a number of questions with respect to Bureau of Indian Affairs (BIA) environmental protection measures on Indian Reservations. Enclosed is our response arranged in chronological order to the questions raised in your letter. We apologize for our delay in responding to the questions you posed.

Please be assured that our environmental staff is available to assist you in drafting the survey questionnaire referred to in question No. 12. Feel free to call Mr. George Farris and Mr. Frank Khattat at 343-2791 or 343-4004 respectively, to set a time and place for such a meeting.

Should you have any questions or desire more information, please let us know.

Sincerely,

Patrick A. Hayes

ACTING Deputy to the Assistant Secretary -
Indian Affairs (Trust and Economic
Development)

Enclosure

Answers to Questions

# of the

Select Committee on Indian Affairs

---*---

Question No. 1: How many industries or businesses on Indian lands have posted bonds for potential environmental problems?

Answer: None of the industries or businesses have posted bonds specifically for potential environmental problems. However, many of these leases are covered with surety or performance bonds to assure the fulfillment of the terms and conditions of the lease which includes water and land reclamation requirements for certain leases. The bond is not released until plugging, abandonment and/or reclamation work are completed. The total Bureau leases as of October 5, 1989, is 25,516. This includes 6,704 oil and gas leases, 217,181 agriculture leases and 155 mineral leases. The last two are for calender year 1987.

Question No. 2: Who asserts the need for bonds in a given lease within the BIA?

Answer: The agency superintendent having jurisdiction over the leased land asserts the need for performance bonds over agricultural leases. For mining leases, the superintendent asserts the need for performance bonds but the amounts are determined by the authorized officer of the Bureau of Land Management (BLM) who approves, supervises and directs the mining operations.

Question No. 3: How is this determination reached?

Answer: For agriculture and business leases, other than mineral leases, the agency superintendent exercises judgement as to what criteria he should employ to reach a decision on performance bond requirements. For mining leases, the superintendent consults with the concerned tribe and the BLM authorized officer, who recommends the lease terms and conditions. Based on BLM's recommendations, BIA determines the final terms and conditions. For permitting coal mines, the Office of Surface Mining (OSM) sets the bonding requirements depending on the requirements of the approved permit and the reclamation plan submitted. It may be based on, but is not limited to the estimated cost submitted by the permit applicant.

Question No. 4: What type of investigation is done at BIA to ensure that a lessee is fiscally responsible for environmental problems?

Answer: This investigation is performed by the agency superintendent as required in 25 CFR 216.4 for surface mining leases through technical analysis by his staff when an application for a mining lease is submitted. The operator is required to submit a mining plan which includes reclamation measures to be conducted during and after mining has ceased. Similar but lesser environmental reviews are conducted for other surface leases where it is determined that disturbance to land and water resources is anticipated during the performance period. Leases for siting major projects such as pipelines and utility corridors, would require National Environmental Policy Act compliance. Applicants are required to submit to the BIA an environmental document, in sufficient detail, to review likely environmental impacts of the proposed activity on Indian lands. The agency staff survey and investigate the site prior to the preparation of an Environmental Assessment (EA). Should the conclusion of the EA be to prepare an Environmental Impact Statement (EIS) based on potential significant environmental impacts, a notice of intent is published in the Federal Register to prepare an EIS. BIA then undertakes scoping which includes public meetings to discuss areas of environmental concerns which may be addressed in the EIS. The EIS is usually performed by a consultant hired by the applicant.

Question No. 5: How much has BIA budgeted for emergency response capability on Indian lands for hazardous spills?

Answer: Emergency response for hazardous spills has been an EPA responsibility under the EPA Indian policy. BIA coordinates emergency response actions with the on-scene coordinator who determines response costs on a case by case basis (See response to question No. 9). Therefore, BIA does not budget for this activity.

Question No. 6: What steps has BIA taken to bring landfills on Indian lands into compliance with EPA regulation?

Answer: The majority of landfills on Indian reservations are tribal open dumps. Owners/operators are responsible for compliance with EPA regulations. The Indian Health Service (IHS) which constructs these landfills, operates them for one year and turns them over to tribes. While IHS monitors their sanitary conditions, the overall environmental compliance rests with the owner/operator. The Bureau has no jurisdiction over tribal landfills. EPA enforces the requirements on tribal landfills. If landfills are on administrative (Federal Reserve) land, they may be managed by the facility management staff or if the facilities program or other Bureau programs contribute waste to a landfill, there may be some Bureau facilities responsibility at the program's generating facility to comply with appropriate environmental standards. The Office of Construction Management, within the the Department, is currently in the process of awarding an environmental contract designed to review the compliance status of Bureau facilities and utilities systems.

Question No. 7: Are any BIA employees certified as emergency response personnel? How many?

Answer: None of the BIA personnel are certified as as on-scene coordinators for oil spills. We understand that certification is only required of vessel or transportation operators and their personnel. Tribal and BIA personnel cooperate by providing needed on-scene assistance, coordination and follow up.

Question No. 8: What steps has BIA taken to identify industries in Indian country which must notify EPA that they are hazardous waste generators under the provisions of RCRA?

Answer: Since most industries in Indian country are small quantity generators, generating less than 1000 kilograms (2,200 pounds) of wastes per month, the Bureau central office disseminated applicable EPA rules and requirements in January 1987. This included an EPA booklet entitled "Understanding the Small Generator Hazardous Waste Rules: A Handbook for Small Business." We specifically requested all BIA field offices to pay attention to the March 24, 1987, deadline for generators to notify the EPA and obtain a generator's permit and a storage permit for hazardous waste that must be stored longer than six months. The instructions and booklets were sent in ample number to every field office. During the BIA program review, a status check revealed that the field offices have not followed up in advising lessees and permittees who generate hazardous waste. The Bureau is currently preparing to notify these parties to comply with these requirements.

Question No. 9: What steps has BIA taken to provide emergency response personnel for removal of hazardous waste on Indian reservations?

Answer: BIA is always ready to assist in emergency response for removal of hazardous waste. The road engineer and the facility manager in each BIA agency renders such assistance in accordance with the instructions of the on-scene coordinator (usually the EPA). The EPA has taken the lead for emergency removal actions in accordance with the national contingency plan (40 CFR 300) and the regional contingency plan. In some area offices and agencies, BIA and tribal personnel actively participate in response actions with the regional response team.

Question No. 10: Does BIA have personnel who can respond to hazardous spills in Indian country? If not, how are hazardous spills handled?

Answer: BIA agency land operations personnel with assistance of the facility engineer or manager, safety officer and in some agencies the environmental protection specialist respond to hazardous spills on the Indian reservation they are serving. The management and coordination of response actions are the responsibility of the agency superintendent at the local reservation level. The environmental quality specialist at the area office can coordinate emergency response actions as needed with an EPA on-scene coordinator (backed by the regional response team) who oversees and coordinates response actions at the scene of a hazardous spill. Major incidents would also be reported to the BIA central office, for coordination with the national response team and the Departmental emergency response system.

Question No. 11: What does BIA plan to do to assist tribes in the development of environmental regulatory capability?

Answer: EPA is the lead Federal agency which may delegate its environmental statutory authority to the states and the Indian tribes for compliance with environmental statutes. EPA is currently working to develop tribal capabilities to assume regulatory control over reservation environment. BIA's role is to facilitate and enable tribes to understand Federal regulatory requirements and coordinate with the EPA headquarters and regional offices with respect to funding and training tribal members to assume these regulatory functions. BIA is working with the EPA national Indian program office in setting tribal priorities and conducting an inventory of reservation environmental problems in accordance with a Memorandum of Understanding between the two agencies, Indian Health Service and the Department of Housing and Urban Development. This, of course, requires funding to expand BIA's environmental technical assistance staff at the field level.

Question No. 12: Please provide us with the names of any BIA employees who will be available to assist in the preparation of a survey of the environmental protection needs of the tribes.

Answer: BIA believes that the committee staff survey of tribal environmental needs is a step in the right direction. While EPA is the lead agency in compliance by Indian tribes with environmental laws, BIA will be happy to assist in the preparation of the survey questionnaire. Please contact Mr. George Farris and Mr. Frank Khattat to assist the committee staff in the formulation and design of the questionnaire.

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Environmental Services
BCCO 1491

Honorable Daniel K. Inouye
Chairman, Select Commitee
on Indian Affairs
United States Senate
Washington, DC 20510-6450

Dear Mr. Chairman:

This is in reference to your letter of July 19, 1989, which referenced the June 23rd hearing of the Select Committee on Indian Affairs. Your letter requested written response to questions concerning the Pueblo of Zuni in New Mexico and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana.

As a result of the certificate of emergency for Zuni's domestic water supply and visits to the Pueblo by the Bureau's Washington and Albuquerque Area Office staffs, a meeting was held in Albuquerque with the Indian Health Service on June 30 to discuss the situation and determine the steps necessary to address the problem.

At the meeting, both the Bureau and the Indian Health Service (IHS) expressed concern about the water situation and agreed to work together to try and resolve the problem. For the immediate present, a plan was devised in which IHS would isolate certain sections of the water delivery lines, clean them out, superchlorinate, and hopefully raise the quality of the water in order that the residents may start using the system again. For the long term, the IHS field staff requested Bureau assistance in helping the Tribe find additional funds for the eventual repair/replacement of the system.

An additional meeting was held July 14 to further discuss the situation and actions to be taken. A third meeting was held on August 2 with the Bureau, the Tribe, IHS and other Federal agencies to discuss alternative sources of funding for the long-range corrections. This meeting resulted in commitments from the Environmental Protection Agency, Housing and Urban Development and the Economic Development Administration to help look for funding to address the situation. Assistance will also be provided to BIA, IHS and the Tribe in pulling test reports and other information together to better define the problems and to better determine the potential costs involved. Finally, during this period, the Bureau has sent a letter to IHS headquarters formally transmitting the Pueblo's certificate of emergency for their action and advising of our willingness to assist them in this matter.

The problems on Ft. Peck are a result of secondary recovery processes used to extract petroleum from the earth. This process produces brine, which if not properly and carefully handled will contaminate ground water and surface water supplies. At Ft. Peck, there were leaks in the brine disposal and storage facilities that contaminated the area. The Bureau's Billings Area Office is currently proceeding with a cooperative investigation with the U.S. Geological Survey and the Tribe to determine the extent and sources of the brine contamination. The investigation will be governed by the amount of funding which will be allocated to this effort. The State of Montana may also be included in the investigation as part of the lands in the investigation are fee patent. At present, there is no firm plan on who will be the lead agency in the investigation. However, the Tribe will at least have a cooperating role with the other Federal agencies involved.

It is hoped that the above has been responsive to your request. Your interest in these matters is greatly appreciated.

Sincerely,

Deputy to the Assistant Secretary -
Indian Affairs (Trust and Economic
Development)

PUEBLO OF ZUNI
P. O. BOX 339
ZUNI, NEW MEXICO 87327

ROBERT E. LEWIS
Governor
PESANCIO LASILOO
Lt. Governor
BARTON MARTZA
Hd Councilman
EDWARD BEYUKA
Councilman

VIRGIL WYACO, SR.
Councilman
ANGUS MAHOOTY
Councilman
RITA ENOTE LORENZO
Councilwoman
WILLIAM TSIKEWA, SR.
Councilman

In reply refer to:

505-782-4481

June 20, 1989

Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510-1102

Dear Congressman Yates:

The seriousness of our water and sewer situation, of which you have previously been sent documentation on, gives us cause at this time to send you:

1. Zuni Tribal Resolution No. M70-89-L063;
2. Memorandum of June 5, 1989, from Superintendent Zuni Agency to the Area Director, Albuquerque Area Office, Subject: Certificate of Emergency - Zuni Community Domestic Water System; and
3. Memorandum of June 19, 1989, to the Assistant Secretary-Indian Affairs from the Albuquerque Area Director, Subject: Certificate of Emergency - Pueblo of Zuni.

We would greatly appreciate your assistance in obtaining the funds to remedy the unhealthy water and sewer situations, of our community.

Sincerely,

Robert E Lewis

Robert E. Lewis, Governor
Pueblo of Zuni

Enclosures

ZUNI TRIBAL COUNCIL
ZUNI, NEW MEXICO

June 9, 1989

RESOLUTION NO. M70-89-L063

WHEREAS, the Zuni Tribal Council, consisting of the Governor, Lieutenant Governor and six Tenientes is declared to be the legislative authority of the Pueblo of Zuni by Article V, Section 1, of the Constitution of the Zuni Tribe; and,

WHEREAS, the Zuni Tribal Council pursuant to Article VI, Section (d), of the Constitution of the Zuni Tribe is authorized to act in all matters that concern the welfare of the Tribe; and,

WHEREAS, the Zuni Tribe pursuant to the engineering report, medical records and recommendations from chemical laboratory reports are requesting emergency assistance to improve the Zuni-Blackrock drinking water and sewer system;

NOW, THEREFORE, BE IT RESOLVED, that the Bureau of Indian Affairs is requested to assist in this matter by issuing a certificate of emergency on the Zuni-Blackrock drinking water and sewer system.

ZUNI TRIBAL COUNCIL:

Absent (Excused)
Pesancio Lasiloo, Lt. Governor

Virgil Wyaco Sr.
Virgil Wyaco, Sr., Teniente

Barton Martza
Barton Martza, Head Teniente

Absent (Excused)
Angus Mahooty, Teniente

Edward A. Beyuka
Edward Beyuka, Teniente

Rita Enote Lorenzo
Rita E. Lorenzo, Teniente

William Tsikewa Sr.
William Tsikewa, Sr., Teniente

Resolution No. M70-89-L063

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Zuni Tribal Council at a duly called meeting at Zuni, New Mexico, at which a quorum was present and that the same was approved by a vote of 6 in favor and 0 opposed on June 9, 1989.

Robert E. Lewis
Robert E. Lewis, Governor, Pueblo of Zuni

APPROVED/~~VETOED BY~~:

Robert E. Lewis 6-9-89
Robert E. Lewis, Governor Date

APPROVED: 6/9/89

Joseph Pequartee
Superintendent, Zuni Agency (Acting)
Bureau of Indian Affairs

JUN-20-89 TUE 15:01 PUEBLO OF ZUNI P.03

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
ZUNI AGENCY
P.O. BOX 369
ZUNI, NEW MEXICO 87327

IN REPLY REFER TO:
Superintendent

JUN 5 1989

Memorandum

To: Area Director, Albuquerque Area Office

From: Superintendent, Zuni Agency

Subject: Certificate of Emergency - Zuni Community Domestic Water System

On behalf of the Bureau of Indian Affairs, Zuni Agency, we support the Zuni Tribe's effort to replace and upgrade their Zuni water supply system, sewage collection system and sewage treatment facility. The existing facilities have been referred by Indian Health Service, Zuni, New Mexico, as "extremely poor" and a hazard to human health.

In addition, an "Environmental Health Survey Report of the Zuni Community Water Supply" by R. E. Enscore in 1988 points out that chemical analysis of the potable water frequently exceeds the Environmental Protection Agency recommended standards for filterable residue, sodium, turbidity, dissolved iron, manganese, sulfates and bicarbonates and periodically becomes bacteriologically contaminated with coliforms. Therefore, based on these chemical analysis, studies and medical reports, we join Indian Health Services in issuing a Certificate of Emergency for the Zuni Community Domestic Water System.

Superintendent

FILE COPY
Surname
Joe Peynetsa

Superintendent JUN 9 1989

Memorandum

To: Area Director, Albuquerque Area Office

From: Superintendent, Zuni Agency

Subject: Emergency Domestic Water Situation

Attached is the Zuni Tribal Council's Resolution No. M70-89-L063, dated June 9, 1989. Through this resolution the Governor and Tribal Council are requesting emergency assistance from the Bureau of Indian Affairs in improving the Zuni-Blackrock water and sewer system. I am fully aware of the situation and wholeheartedly endorse this plea for assistance.

If additional information is required, please call me.

Joseph Peynetsa
Acting Superintendent

200:JPEYNETSA:rq:06/09/89
Chrono
Subject file

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P.O. BOX 26567
ALBUQUERQUE, NEW MEXICO 87125-6567

IN REPLY REFER TO:
380 - Branch of Natural Resources
Management and Planning

JUN 19 1989

Memorandum

To: Assistant Secretary - Indian Affairs

From: Area Director

Subject: Certificate of Emergency - Pueblo of Zuni

Attached is a Certificate of Emergency submitted by the Superintendent, Zuni Agency, along with a Resolution from the Zuni Tribal Council, a preliminary engineering cost estimate, and letters of concern from the medical and professional community at Zuni. The issue is the unsafe and unhealthy condition of the Zuni water supply. The engineer's report and supporting letters attest to the need for immediate attention to an antiquated water and sewer system that is a source of sickness and disease in the Zuni community.

I wholeheartedly agree with the Pueblo of Zuni's request for urgent assistance in this matter. There is a need for this situation to be brought to the attention of the proper office at the Washington level. We realize that public health in the Indian community is the responsibility of the Indian Health Service and that they have taken preliminary action in this matter, but we want to lend our expression of concern to that of the others because of the vulnerable position to lawsuits by individuals that the government of the Pueblo of Zuni and the federal government are placed in. A failure to act in this matter that concerns the health and well being of the large number of people who use the Zuni water supply would be unconscionable on the part of both governments.

Area Director

Attachments

FORT PECK TRIBES
Assiniboine & Sioux

June 2, 1989

The Honorable Daniel K. Inouye, Chairman
Select Committee on Indian Affairs
United States Senate
ATTN: Virginia Boylan
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Honorable Inouye:

I, Raymond White Tail Feather, Chairman of the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation in Poplar, Montana. First, I would like to thank you for conducting the oversight hearings on the implementation of the U.S. Environmental Protection Agency's Indian Policy. Your concern in matters regarding Indian Tribes across America is appreciated

Comments on EPA's Indian Policy

The Fort Peck Tribes maintains an Office of Environmental Protection. This office was created in response to the increased amount of energy development within and around the Fort Peck Indian Reservation. In 1980, the Fort Peck Tribes began the process to redesignate the Tribes' airshed to a Class I area. In 1984, the Class I designation was granted by the U.S. Environmental Protection Agency. Stream classifications and water quality were also initiated during this period.

Currently, the Tribes are pursuing a Section 106 Grant under the Clean Water Act for water quality monitoring on the major tributaries within the Fort Peck Reservation. Underground Injection of salt water from produced oil wells is also a concern of the Fort Peck Tribes as tribal members have had their drinking water wells contaminated from produced salt water brine. Air quality monitoring continues under a grant from the Environmental Protection Agency with cooperation from the State of Montana. Being a largely agricultural area, pesticide enforcement is also a program the Fort Peck Tribes would like to administer within the reservation boundaries. The Fort Peck Tribes are also members of the Valley County Solid Waste District which serves residents of the western end of the reservation with containerized solid waste disposal. Title III of SARA is being addressed through various health and welfare organizations within the Tribes as two transportation corridors, U.S. Highway 2 and the Burlington Northern Railroad, move toxic and hazardous materials daily. Several pesticide suppliers and two industrial parks are also located within the boundaries of the Fort Peck Reservation.

As a reservation almost solely dependent on groundwater for drinking, the Tribes are also looking at the Wellhead Protection Program under the Safe Drinking Water Act. Roosevelt County, which is located in the central and eastern end of the reservation, is running out of room in the Wolf Point landfill and the county has not developed a Solid Waste District. The Tribes would like to see the development of a Solid Waste District for this area as most of the residents of the Fort Peck Tribes live within this county but as yet do not have any authority or funding to do so under RCRA. Water quality standards of the major tributaries are beginning to be addressed through the minimum instream flow study which is beginning this summer. As you can see, future plans for environmental protection on the Fort Peck Reservation are varied and ambitious.

Through Tribal, federal, state, and local efforts, environmental protection of some resources has been achieved while others have been destroyed from a checkerboard of regulating agencies. Oilfield exploration and development is a perfect example. On Fort Peck, the Bureau of Indian Affairs' Land and Minerals Division, Bureau of Land Management, Oil and Gas Commission of the State of Montana, the Environmental Protection Agency, and the Fort Peck Tribal all may be involved in leasing, drilling, production, disposal, and closure depending on the ownership of a well. This maze has lead to surface and groundwater problems on the reservation.

A lead agency with a clear policy is essential to adequately insure the protection of resources within the reservation boundaries. the Environmental Protection Agency's Indian Policy is a step in the right direction. Recognizing Tribes as the primary parties for regulating, setting policy and managing programs on tribal lands insures a sensitivity to sovereign nations and protection of the environmental by the people who are most impacted by its abuse. However, a tribal resource person does not have to page through EPA's various programs to see that this policy is not being fulfilled. Specifically, the RCRA and Clean Air Act regulations which are being brought up for reauthorization during this congressional year. Draft regulations for RCRA were circulated last year for comment. Indian Tribes were asked to respond to the "section" dealing with Indian Tribes. The "section" was a paragraph in a one hundred eight page document. Clearly, this is not an attempt to recognize Tribes as the primary party on Indian Reservations. Treatment of Tribes as States, an EPA policy, should be an element of every program regulated by EPA. The Fort Peck Tribes have a sincere interest in solid waste as does every Tribes and should not be subject to the jurisdiction of a local government, i.e. the county, who often do not consider the needs of tribal members.

The Clean Air Act also has no Indian set aside included in the act. Many Tribes have been impacted by resource development on or near their lands as have the Fort Peck Tribes. Coal and oil development significantly deteriorate the airsheds on reservation lands. Tribes needs should be addressed through a separate Indian Amendment to maintain air quality on Indian lands as is mandated by the Indian Policy which is treatment of Tribes as States. Management of a reservation's airshed should be done by the Indian Tribe residing on that reservation. Clearly there is a need for an Indian Amendment to the Clean Air Act not only to insure clean air for residents of these areas but also to fulfill EPA's own policy.

Your help for full implementation of EPA's Indian Policy is needed. Indian Tribes across the country are concerned about the health and welfare of their people. In order to effectively protect the resources, Tribes need to work within EPA's programs and have the mandate and dollars to do so. By not addressing Indian Tribes needs through separate amendments to the Clean Air Act and RCRA, EPA is only giving lip service to an Indian Policy that could prove beneficial to Tribes, States, and the Federal Government if given the benefit of full implementation.

Thank you for time concerning these issues. Your every consideration of these issues is deeply appreciated. the Fort Peck Tribes are ready and able to assume protection of the precious natural resource here in eastern Montana. We would like your help in doing so.

Sincerely,

Raymond White Tail Feather
Chairman
Fort Peck Assiniboine & Sioux Tribes

STATEMENT BY DALE KOHLER
ON BEHALF OF
THE
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

Mr. Chairman and Members of the Committee, my name is Dale Kohler and I am here as a representative and Chairman of the Law and Justice Committee of the Colville Business Council of the Confederated Tribes of the Colville Reservation. I am also Vice-Chairman of the Colville Environmental Quality Commission which was established in 1985 to coordinate the development of the Tribes' Environmental Programs and operate as the administrative appellate body of the Colville Water Quality Management Program. (App. A).

On behalf of the Colville Tribes I would like to take this opportunity to thank the Committee for its invitation to present testimony at this Oversight Hearing on the implementation of EPA's Indian Policy and Environmental Programs on Indian lands.

On January 24, 1983, President Reagan issued his Indian Policy Statement committing the federal government to the twin themes of working with Indian tribes on a government to government basis and encouraging self-determination. (App. B). To its credit EPA became the first (and to my knowledge the only) executive agency to act on the President's statement by initiating its own agency specific Indian policy and guidance in November, 1984 which acknowledged the primary role of tribal governments in the implementation of federal environmental law. (App. C). At about the same time EPA also embarked on a pilot program to assist four tribes in developing natural resource regulatory programs for their respective reservations. EPA Journal, Vol. 12, No. 1, pp. 23-26, Jan/Feb. '86; Vol. 13, No. 3, pp. 28-31, April, '87.

Beginning in 1978 the Colville Tribes embarked on a project to develop a comprehensive water quality management program for the Reservation. That program was beginning to bear fruit in the early 1980's and the Colville Tribes was fortunate to be chosen by EPA as one of the four pilot program tribes.

With the Congressional amendments to Superfund and the Safe Drinking Water Act in 1986 and the Clean Water Act in 1987, EPA's policy received Congressional approval and tribal authority over Indian lands was strengthened. In light of these accomplishments, one would think that environmental program development in Indian country would be well established. Unfortunately, the EPA has for the most part failed to implement its Policy beyond the rhetorical stage. It has moved cautiously, ponderously and even ignored statutorily imposed deadlines. After five years the Policy is little more than a paper program lacking any real substance.

The Colville Tribes believes three major reasons exist for EPA's lack of progress in implementing its Indian policy and reservation programs. First, the amount of staff, time and money dedicated to the operation of federal programs in Indian country and assistance to tribes to enable them to develop their own delegable programs is woefully inadequate. Second, the Agency suffers from institutional inflexibility and bias that stifles creative and responsive solutions necessary to overcome some of the barriers to implementing a workable environmental regulatory program in Indian country. Finally, because the federal role in the federal/state partnership under the various federal environmental laws is largely one of technical support and administrative oversight, the Agency usually delegates operational responsibility to the states and is ill-equipped to actually operate a regulatory program.

After developing each of these points in greater detail, I would like to share with the Committee some specific case studies from Colville which I believe will underscore the problems EPA is experiencing.

The Need For Increased Funding And Staffing.

On January 19, 1989, EPA submitted its report to Congress required by the Water Quality Act of 1987 on Indian Wastewater Treatment Needs and Assistance. The Report is indicative of the massive failure of the system to effectively address environmental protection in Indian country in all environmental media. The Report indicates that while $48 billion dollars has been expended by the federal government and awarded to municipalities to support construction of wastewater treatment facilities under Title II of the Clean Water Act since 1972, only $25 million dollars (approximately 1/2 of 1%) was awarded to Indian tribes. The Report then goes on to discuss the current treatment needs in Indian country in order to avoid environmental health risks and comply with the water quality goals of the Clean Water Act. The $270 million dollars expected to be needed, far outdistances the $30 million available to tribes through 1990. I should note parenthetically here that although the Clean Water Act contemplates the state revolving fund mechanism for financing future municipal treatment works, the Colville Tribes urges the Committee to direct Title II funding to Indian tribes beyond the 1992 sunset date in order to address this urgent need. Although, these figures represent just one small component of environmental challenges facing tribes today, its lessons apply uniformly to all environmental media and it underscores the failure of the federal/state partnership to adequately protect the reservation environment.

The current funding structure and staff devoted toward Indian program development and regulation is virtually nonexistent. To date, the Agency has committed no more than minimal staff and funds towards implementation either of its Indian policy or its congressional mandate on Indian lands. Most Regions only have one Indian staff person (Indian coordinator) and many of those are not even full-time. The EPA currently plans to place an Indian liaison person within the respective state operations offices. If that individual is the same low level staff appointee as the Indian coordinator is at the Regional offices, s/he will have precious little clout within the Agency to get anything done. At a minimum, the Indian coordinator and Indian liaison must be at the organizational equivalent of a program manager so that when they speak to the various media program directors they are on equal footing and will be listened to. Direct access to the Regional Administrator is also imperative.

A further complicating staff problem is that no enforcement personnel or program people are assigned specifically to reservation issues, even though EPA retains jurisdiction over Indian country for those regulatory programs it delegates to the states. See, Washington v. EPA, 752 F.2d, 1465 (9th Cir., 1985); Phillips Petroleum Co., v. EPA, 803 F.2d 545 (10th Cir., 1986). Attorney staff is also not assigned to enforcement issues on the reservation. In fact, in Region 10, four attorneys have left the Agency within the last year and none of them have been replaced to date. This included the lead attorney on Indian affairs for the Agency nationwide. As a result, precious little regulation occurs on Indian lands.

Since EPA is ill-equipped to assume the regulatory role in Indian country and the state lacks the authority to do so, tribal infrastructures need to be developed in order for tribes to assume that responsibility. Therefore, a huge infusion of money on the scale similar to what the states have received over the years is needed. It will not help, however, to simply build up tribal infrastructure without a corresponding improvement in EPA staff and funding levels.

Therefore, the Colville Tribes strongly supports the proposal first submitted to Chairman Traxler of the VA, HUD and Independent Agencies Committee calling for increased staffing of forty-seven FTE's at the Headquarters and Regional levels, $25 million dollars in infrastructure development grants to tribes and an additional $12 million dollars for special discretionary projects to be determined by the Administrator. The Colville Tribes has previosly submitted a statement to that Committee. (App. D). Without such a financial and personal commitment, EPA's Indian policy will be little more than what it has been to date, an inspirational program on paper with little practical substance in Indian country itself.

EPA's Institutional Inflexibility and Bias.

When EPA initiated its Indian policy in 1984, it hoped to put programs in place on the most critical reservations within five years. (See Memo from Allan Hirsch to Josephine Cooper, App. E). Unfortunately, otner than the initial pilot projects, EPA has been unable to make any significant strides in the implementation of its Indian policy. The Colville Tribes believes that, as with all bureaucracies, a significant reason is EPA's inability to restructure itself to adapt to the changing dynamic of working with three sovereigns as called for by its Indian policy. EPA's historical relationship at the regional and state office levels has been a bilateral one. Since most of EPA's program responsibility is delegated to the respective states, it focuses more on monitoring and oversight of those programs than actual on the ground program development or enforcement. Because it did not know what to do with tribes, it proposed to place tribes in the state operations office. Unfortunately, most program staff were unaware of the Indian policy and what a government to government relationship means.

Two years ago the Colvilles had an instance which underscores this lack of knowledge. EPA responded to a private investigation request regarding possible cyanide leaching from an abandoned mine on the Reservation and did some soil and water monitoring sampling. The program people did not notify the Colville Tribes of their activity and were not even aware they were operating on a reservation. When a letter was written to the staff person in charge of the sampling asking that the report be submitted to the Colville Tribes as the responsible government, the letter was ignored. When asked why, the staff responded by saying that they always report to the State of Washington because the state has program responsibility. The Tribes still has not received the information requested despite several subsequent efforts.

Another example is the continued endorsement of State RCRA inspections and monitoring on Indian lands in spite of EPA's position and the Court's determination in Washington v. EPA by the Washington Operations Office (which incidentally is located at the State Department of Ecology complex in Olympia). More recently, the Colville Tribes attempted to discuss general enforcement and response coordination for the Reservation with the head compliance officer of Region 10 using a possible illegal dumping of asbestos waste on the Reservation as a case study. The Tribes was informed that the individual did not deal with such issues and that the Tribes should go to the Washington Operations Office. The person indicated that he only dealt with

12th floor issues, which is where the Regional Administrator's office is located. Except perhaps, at the highest level of EPA, the agency staff have not yet grasped the meaning of government-to-government relationship.

These are by no means isolated instances. The Colville Tribes has spent literally thousands of dollars over the past five years sending Council members and staff to meetings with various EPA program leaders and staff in order to get them comfortable with and familiarize them with Indian issues and the Agency's own Indian policy.

A further institutional problem with EPA is its highly compartmentalized structure which does not lend itself readily to cross-media program development. Indian tribes do not have the funds, staff or inclination to mimic state or federal environmental organizational structures, yet EPA appears unwilling (perhaps unable) to explore alternate methods such as developing cross-media strategies for Indian programs. Because such strategies have never been developed and are so new, the Agency is reluctant to explore such creative solutions to program development constraints that are unique to Indian tribal governments and environmental problems in Indian country.

The Colville Tribes believes that EPA is unable to solve this institutional immobility alone and that some kind of impetus from this Committee and Congress is necessary. EPA's difficulty in implementing its Indian policy and Congressionally mandated programs or meet statutorily imposed deadlines is really not significantly different from EPA's record under other comprehensive environmental remedial legislation. For example, Congress enacted SARA in response to EPA's miserable record under Superfund. The Colville Tribes asks the Committee to make specific directions to EPA to force it to institutionalize its Indian policy and make its Indian programs an effective part of the overall environmental regulatory system nationwide. Requiring Indian operation offices at the administrator and regional levels, upgrading key Indian staff positions and developing a program and enforcement presence independent of state action on Indian reservations would be a significant first step and a welcome the boost to tribal efforts to establish a broad based environmental regulatory program in Indian country.

Federal Promulgation of the Colville Tribes' Water Quality Standards

At the beginning of my comments, I indicated I believed that citing specific examples of our experience at Colville would highlight many of the difficulties EPA and Indian tribes have faced in implementing the Indian policy and developing workable reservation-wide regulatory programs. A review of the EPA's reaction to the Colville Tribes' request to promulgate its water quality standards as federal standards and the corresponding relationship to NPDES permitting will underscore some of the institutional, staff and funding problems that I have discussed.

Prior to the adoption of the Clean Water Act Amendments, the Colville Tribes entered into a cooperative agreement with EPA

Region 10. (App. F). The Agreement included a provision that EPA would promulgate the tribally adopted water quality standards as federal standards and assume NPDES permitting on the Colville Reservation. When the Colville Tribes insisted that EPA uphold its promise with regard to an application to renew an expired permit at a sawmill located on the Reservation and EPA instructed the State of Washington to transfer the renewal application to EPA, the State threatened to dump all pending NPDES applications on all reservations within Washington on the EPA. Since EPA Region 10 only averages one major permit per year, the threat generated much concern with the Agency and substantially slowed down the process while the officials at EPA debated how to fulfill its obligation to the Colville Tribes under the Agreement, remain consistent with its Indian Policy, and still keep the State from unloading all NPDES permit applications in Indian country on the Washington Operations Office.

The original permit for the facility which was written by the State violates the Clean Water Act. (See, Colville Tribes comments on EPA's Proposed Rule to Promulgate Federal Water Quality Standards for the Colville Indian Reservation, App. G at 4). Although, EPA began processing the application for the renewal permit, that application process has been at a standstill for over two years because EPA determined that it would need to have the Tribes' federally promulgated water quality standards in place before it could issue a permit for a reservation-based facility. Unfortunately, while promulgation of the Tribes' Water

Quality Standards as federal standards was also a component of the Tribal/EPA Agreement, that process is now in its third year of review since the tribe's initial submission and request on February 4, 1986. Region 10 has strongly supported the Tribes' request and moved rapidly, sending a recommendation to Headquarters to promulgate the Tribes' standards on March 13, 1986. The request has languished within the federal bureaucracy for over two years, however. (See, Colville Tribe's chronology of water quality standards promulgation, App. H). The Standards are on Administrator Reilly's desk awaiting final approval before they can be published in the Federal Register. Whether the Standards will ever be promulgated and whether the federally issued permit will occur remains to be seen. Meanwhile, the operator continues to violate federal law.

Because the Tribes' request to promulgate the Standards was so new and because no one really thought about the practical effects of the Indian policy and how one goes from the words of the policy to actual development of program management, the Tribes has had to expend untold thousands of hours of effort to try and bring the Agency along. As soon as the amendments to the Clean Water Act were adopted in 1987, EPA Headquarters wanted to abort the promulgation process. Since the proposed regulations called for by Section 518 were at least 18 months away, the Tribes' ability to adopt its water quality standards in the same manner as States under Section 303 even further, and the legal basis for the Tribes' position had not changed, The Colville

Tribes was able to convince Headquarters to proceed with the promulgation. Unfortunately, as you can see from the attached chronology, the standards have languished at different offices for over two years. EPA was particularly concerned with the precedential effect of the promulgations on future tribal attempts to federally promulgate rather than use the mechanism available after the 1987 amendments. Meanwhile, the sawmill facility is operating in violation of the Clean Water Act with a permit that expired four years ago. The Tribes' water is not being protected and NPDES permitting is at a standstill.

This is just one example of the catatonia the Agency experiences whenever it tries to move from its policy on paper to implementation. The Colville Tribes hopes that the Committee can provide the Agency with greater direction and instill a commitment in it to devote the necessary staff, funding and interest to develop workable programs on reservation lands.

Mr. Chairman and members of the committee, the Colville Tribes thanks you again for your continued support and concern for Indian people and integrity of the reservation environments. We will assist you in any way you deem appropriate as you consider our testimony. Thank you.

APPENDIX

INDEX

A. Colville Business Council Resolution 1985-464 Establishing the Colville Environmental Quality Commission

B. President Reagan's January 24, 1983 Indian Policy Statement

C. Environmental Protection Agency's November 8, 1984, Indian Policy and Implementation Guidance

D. Letter to HON. Barbara Mikulski on EPA Implementation of Indian Lands Programs.

E. Outline for Implementing an EPA Indian Policy Prepared by the Office of Federal Activities

F. Cooperative Agreement between the EPA and the Confederated Tribes of the Colville Reservation

G. Comments of the Confederated Tribes on EPA's Proposed Rule to Promulgate Federal Water Quality Standards for the Colville Indian Reservation

H. Chronology of the Federal Promulgation of the Colville Tribes Water Quality Standards by EPA

[illegible]

RESOLUTION

A Resolution Establishing the Colville Environmental Quality Commission.

WHEREAS, The Business Council of the Confederated Tribes of the Colville Reservation, Washington, is the governing body of the Tribe by authority of Article II of the Amended Constitution and Bylaws of the Confederated Tribes of the Colville Reservation;

WHEREAS, the Business Council is empowered under Article V, Section I of the Tribal Constitution to: protect and preserve the property, wildlife and natural resources of the Confederated Tribes; protect the health, security, and general welfare of the Confederated Tribes; and promulgate and enforce ordinances;

WHEREAS, the Business Council wishes to protect and preserve the property, wildlife and natural resources of the Colville Reservation and health and welfare of the people residing on the Reservation and is aware that activities taking place on or near the Reservation may adversely affect these resources and values;

WHEREAS, it is the goal of the Business Council to establish comprehensive environmental programs for the Reservation, and, in furtherance thereof, the Business Council has determined to establish the Colville Environmental Quality Commission to coordinate the development of these programs;

THEREFORE, BE IT RESOLVED, that we the Colville Business Council meeting in SPECIAL Session, this 19th day of September, 1985 do hereby establish as a subordinate agency of the Business Council, the Colville Environmental Quality Commission (CEQC), which shall function in the following manner and shall have the following responsibilities:

1. Members and Decision-Making. The CEQC shall be composed of (9) members, consisting of: four (4) members of the Colville Business Council who shall be selected by the Colville Business Council. The remaining members of CEQC shall be the Tribal Water Administrator, Tribal Sanitarian, Director of Comprehensive Planning, two persons to be selected by the Bureau of Indian Affairs Colville Agency Superintendent. The CEQC Secretary shall be a Tribal employee selected by CEQC and shall be an ex officio member of CEQC. Each member of CEQC shall designate one alternate to serve in his or her absence, and report this selection to the Secretary. Each of the members, and ex officio member of CEQC shall perform their CEQC duties in addition to their other official duties. Six (6) members of the

CEQC shall constitute a quorum. CEQC shall take action by majority vote with the Chairman of the CEQC voting only in the event of tie vote. All action taken by the CEQC shall be subject to the review of the Business Council.

2. Officers. The CEQC shall have a Chairman and Vice Chairman each selected by the CEQC from among the four Colville Business Council (members of the Commission).

3. Staff Support. The CEQC shall call upon any Tribal, BIA, or IHS Department to provide relevant information, materials or support to the CEQC.

4. Environmental Policy. The CEQC shall develop policy recommendations for environmental matters affecting the Colville Indian Reservation and the recommendations shall be submitted to the Business Council for consideration.

5. Regulatory Programs. The CEQC shall coordinate the development of proposed environmental regulatory programs and shall make recommendations to the Business Council regarding the adoption of such programs. No such program shall be in effect until adopted by the Business Council.

6. Cooperative Agreements. The CEQC may develop proposed cooperative agreements with public or private bodies and shall make recommendations to the Business Council regarding the adoption of such agreements. Such cooperative agreements may provide for intergovernmental coordination, technical assistance, grant funding or other relevant matters. No such agreement shall be in effect until adopted by the Business Council.

7. Tribal Water Quality Program. The CEQC shall serve in functions as designated in The Colville On-Site Wastewater Treatment and Disposal Act, Title 30 of the Colville Tribal Code; The Colville Mining Practices Water Quality Act, Title 31 of the Colville Tribal Code; The Colville Forest Practices Water Quality Act, Title 32 of the Colville Tribal Code; The Colville Water Quality Standards Act, Title 33 of the Colville Tribal Code; and, The Colville Administrative Procedure Act, Title 35 of the Colville Tribal Code.

8. Public Meetings. In connection with the development of proposed environmental regulatory programs, proposed cooperative agreements or in other appropriate instances, CEQC may conduct public meetings.

9. Reporting Responsibilities. The Chairman of the CEQC shall report directly to the Chairman of the Business Council and may be asked from time to time to report to the Business Council. The CEQC shall make semi-annual progress reports to the Business Council.

10. Legal and Technical Support. The CEQC, with the approval of the Business Council, may call upon outside legal or technical assistance to perform legal work for CEQC under contract with the Tribes. Funding for this legal work may be provided from EPA grant monies, ANA grant monies, the BIA or other federal or state funds provided to the Tribes.

RESOLVED FURTHER, that the Business Council hereby rescinds Resolution No. 1983-256, adopted by the Business Council April 18, 1983.

BE IT FINALLY RESOLVED that the Chairman of the Business Council be, and hereby is authorized and directed to take any and all steps necessary to effectuate this Resolution.

COLVILLE BUSINESS COUNCIL

By: ______________________
Al Aubertin, Chairman

CC:HMoses,Jr.
LSTone
GPassmore

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 24, 1983

STATEMENT BY THE PRESIDENT

INDIAN POLICY

This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this Administration pledges to uphold.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.

The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.

This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the federal government, and the private sector will all have a role. This Administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be charted by the tribes, not the federal government.

more

(OVER)

This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Tribal Self-Government

Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal governments which are responsive and accountable to their members.

Early in this nation's dealings with Indian tribes, federal employees began to perform Indian tribal government functions. Despite the Indian Self-Determination Act, major tribal government functions -- enforcing tribal laws, developing and managing tribal resources, providing health and social services, educating children — are frequently still carried on by federal employees. The federal government must move away from this surrogate role which undermines the concept of self-government.

It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development. Necessary federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.

For those small tribes which have the greatest need to develop core governmental capacities, this Administration has developed, through the Assistant Secretary of the Interior for Indian Affairs, the Small Tribes Initiative. This program will provide financial support necessary to allow these tribes to develop basic tribal administrative and management capabilities.

In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other blocks to the states consolidated

more

dozens of categorical federal domestic assistance programs to reduce fragmentation and overlap, eliminate excessive federal regulation, and provide for more local control. This Administration now proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

In addition, we are moving the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs, which maintains liaison with state and local governments. In the past several administrations, tribes have been placed along with vital interest groups, such as veterans, businessmen and religious leaders. In moving the tribal government contact within the White House Intergovernmental Affairs staff, this Administration is underscoring its commitment to recognizing tribal governments on a government-to-government basis.

Further, we are recommending that the Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations (42 U.S.C. 4273) to include a representative of Indian tribal governments. In the interim before Congressional action, we are requesting that the Assistant Secretary for Indian Affairs join the Commission as an observer. We also supported and signed into law the Indian Tribal Governmental Tax Status Act which provides tribal governments with essentially the same treatment under federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

In addition, this Administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the federal-tribal relationship. Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Education Assistance Act of 1975. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. A lingering threat of termination has no place in this Administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

These actions are but the first steps in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing reservation economies.

more

(OVER)

Development of Reservation Economies

The economies of American Indian reservations are extremely depressed with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth have been fragmented and largely ineffective. As a result, involvement of private industry has been limited, with only infrequent success. Developing reservation economies offers a special challenge: devising investment procedures consistent with the trust status; removing legal barriers which restrict the type of contracts tribes can enter into and reducing the numerous and complex regulations which hinder economic growth.

Tribes have had limited opportunities to invest in their own economies because often there has been no established resource base for community investment and development. Many reservations lack a developed physical infrastructure including utilities, transportation and other public services. They also often lack the regulatory, adjudicatory and enforcement mechanisms necessary to interact with the private sector for reservation economic development. Development on the reservation offers potential for tribes and individual entrepreneurs in manufacturing, agribusiness and modern technology, as well as fishing, livestock, arts and crafts and other traditional livelihoods.

Natural resources such as timber, fishing and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources. The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.

With regard to energy resources, both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

It is the free market which will supply the bulk of the capital investments required to develop tribal energy and other resources. A fundamental prerequisite to economic development is capital formation. The establishment of a financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation.

more

Federal support will be made available to tribes to assist them in developing the necessary management capability and in attracting private capital. As a first step in that direction, we provided funds in the FY 1983 budget to provide seed money to tribes to attract private funding for economic development ventures on reservations. As more tribes develop their capital resource base and increase their managerial expertise, they will have an opportunity to realize the maximum return on their investments and will be able to share an increasing portion of the business risk.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.

Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed. This Administration, therefore, is establishing a Presidential Advisory Commission on Indian Reservation Economies. The Commission, composed of tribal and private sector leaders, is to identify obstacles to economic growth in the public and private sector at all levels; examine and recommend changes in federal law, regulations and procedures to remove such obstacles; identify actions state, local and tribal governments could take to rectify identified problems; and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies. It is also to be charged with the responsibility for advising the President on recommended actions required to create a positive environment for the development and growth of reservation economies.

Numerous federal agencies can offer specialized assistance and expertise to the tribes not only in economic development, but also in housing, health, education, job training, and other areas which are an integral part of reservation economies. It is to the advantage of the tribes, and in the interest of the taxpayers, that the federal role be fully reviewed and coordinated. Therefore, this Administration directs the Cabinet Council on Human Resources to act as a mechanism to ensure that federal activities are non-duplicative, cost effective, and consistent with the goal of encouraging self-government with a minimum of federal interference.

Summary

This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

This Administration has sought suggestions from Indian leaders in forming the policies which we have announced. We intend to continue this dialogue with the tribes as these policies are implemented.

The governmental and economic reforms proposed for the benefit of Indian tribes and their members cannot be achieved in a vacuum.

more

(OVER)

This nation's economic health -- and that of the tribes -- depends on adopting this Administration's full Economic Recovery Program. This program calls for eliminating excessive federal spending and taxes, removing burdensome regulations, and establishing a sound monetary policy. A full economic recovery will unleash the potential strength of the private sector and ensure a vigorous economic climate for development which will benefit not only Indian people, but all other Americans as well.

Attachment

more

REAGAN ADMINISTRATION INDIAN POLICY INITIATIVES

- Request that Congress repudiate House Concurrent Resolution 108 of the 83rd Congress which called for termination of the federal-tribal relationship. The Administration wants this lingering threat of termination replaced by a resolution expressing its support of a government-to-government relationship.
- Ask Congress to expand the authorized membership of the Advisory Commission on Intergovernmental Relations to include a representative of Indian tribal governments. In the interim, request that the Assistant Secretary of the Interior for Indian Affairs join the ACIR as an observer.
- Move the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs.
- Establish a Presidential Advisory Commission on Indian Reservation Economies to identify obstacles to economic growth and recommend changes at all levels; recommend ways to encourage private sector involvement, and advise the President what actions are needed to create a positive environment for the development and growth of reservation economies.
- Support direct funding to Indian tribes under the Title XX social services block grant to states.
- Sought and obtained funds for FY 1983 to implement the Small Tribes Initiative to provide financial support needed to allow small tribes to develop basic tribal administrative and management capabilities.
- Sought and obtained funds for FY 1983 to provide seed money for tribes for economic development ventures on reservations.
- Supported and signed into law the Tribal Governmental Tax Status Act which will provide tribal governments with the same revenue raising and saving mechanisms available to other governments.
- Support the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.
- Direct the Cabinet Council on Human Resources to act as a review and coordination mechanism to ensure that federal activities are non-duplicative, cost effective and consistent with the goal of encouraging tribal self-government with a minimum of federal interference.

# # # # # #

EPA, "Administration of Environmental Programs on Indian Lands," (July 1983).

APPENDIX B

STATUTORY ANALYSIS

Clean Air Act
Clean Water Act
Federal Insecticide, Fungicide and Rodenticide Act
Safe Drinking Water Act
Resource Conservation and Recovery Act

Tribe can establish pesticide application guidelines and money to implement & administer program.

This Appendix briefly presents the following information on EPA statutes, relevant to program administration on Indian lands:

A. Regulatory Framework. Summation of key sections establishing delegation and funding mechanisms under each statute.

B. References to Indian Tribes. Summation of key sections referring to Indian tribes under each statute.

C. Experience/Status/Problems. Brief discussion of the Agency's experience and the problems we have encountered in attempting to implement each statute on Indian lands.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF
THE ADMINISTRATOR

NOV 8 1984

MEMORANDUM

SUBJECT: Indian Policy Implementation Guidance

FROM: Alvin L. Alm
Deputy Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel

INTRODUCTION

The Administrator has signed the attached EPA Indian Policy. This document sets forth the broad principles that will guide the Agency in its relations with American Indian Tribal Governments and in the administration of EPA programs on Indian reservation lands.

This Policy concerns more than one hundred federally-recognized Tribal Governments and the environment of a geographical area that is larger than the combined area of the States of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine. It is an important sector of the country, and constitutes the remaining lands of America's first stewards of the environment, the American Indian Tribes.

The Policy places a strong emphasis on incorporating Tribal Governments into the operation and management of EPA's delegable programs. This concept is based on the President's Federal Indian Policy published on January 24, 1983 and the analysis, recommendations and Agency input to the EPA Indian Work Group's Discussion Paper, Administration of Environmental Programs on American Indian Reservations (July 1983).

TIMING AND SCOPE

Because of the importance of the reservation environments, we must begin immediately to incorporate the principles of EPA's Indian Policy into the conduct of our everyday business. Our established operating procedures (including long-range budgetary and operational planning activities) have not consistently focused on the proper role of Tribal Governments or the special legal and political problems of program management on Indian lands. As a result, it will require a phased and sustained effort over time to fully implement the principles of the Policy and to take the steps outlined in this Guidance.

Some Regions and Program Offices have already made individual starts along the lines of the Policy and Guidance. I believe that a clear Agency-wide policy will enable all programs to build on these efforts so that, within the limits of our legal and budgetary constraints, the Agency as a whole can make respectable progress in the next year.

As we begin the first year of operations under the Indian Policy, we cannot expect to solve all of the problems we will face in administering programs under the unique legal and political circumstances presented by Indian reservations. We can, however, concentrate on specific priority problems and issues and proceed to address these systematically and carefully in the first year. With this general emphasis, I believe that we can make respectable progress and establish good precedents for working effectively with Tribes. By working within a manageable scope and pace, we can develop a coordinated base which can be expanded, and, as appropriate, accelerated in the second and third years of operations under the Policy.

In addition to routine application of the Policy and this Guidance in the conduct of our everyday business, the first year's implementation effort will emphasize concentrated work on a discrete number of representative problems through cooperative programs or pilot projects. In the Regions, this effort should include the identification and initiation of work on priority Tribal projects. At Headquarters, it should involve the resolution of the legal, policy and procedural problems which hamper our ability to implement the kinds of projects identified by the Regions.

The Indian Work Group (IWG), which is chaired by the Director of the Office of Federal Activities and composed of representatives of key regional and headquarters offices, will facilitate and coordinate these efforts. The IWG will begin immediately to help identify the specific projects which may be ripe for implementation and the problems needing resolution in the first year.

Because we are starting in "mid-stream," the implementation effort will necessarily require some contribution of personnel time and funds. While no one program will be affected in a major fashion, almost all Agency programs are affected to some degree. I do not expect the investment in projects on Indian Lands to cause any serious restriction in the States' funding support or in their ability to function effectively. To preserve the flexibility of each Region and each program, we have not set a target for allocation of FY 85 funds. I am confident, however, that Regions and program offices can, through readjustment of existing resources, demonstrate significant and credible progress in the implementation of EPA's Policy in the next year.

ACTION

Subject to these constraints, Regions and program managers should now initiate actions to implement the principles of the Indian Policy. The eight categories set forth below will direct our initial implementation activities. Further guidance will be provided by the Assistant Administrator for External Affairs as experience indicates a need for such guidance.

1. THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS WILL SERVE AS LEAD AGENCY CLEARINGHOUSE AND COORDINATOR FOR INDIAN POLICY MATTERS.

This responsibility will include coordinating the development of appropriate Agency guidelines pertaining to Indian issues, the implementation of the Indian Policy and this Guidance. In this effort the Assistant Administrator for External Affairs will rely upon the assistance and support of the EPA Indian Work Group.

2. THE INDIAN WORK GROUP (IWG) WILL ASSIST AND SUPPORT THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS IN DEVELOPING AND RECOMMENDING DETAILED GUIDANCE AS NEEDED ON INDIAN POLICY AND IMPLEMENTATION MATTERS. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD DESIGNATE APPROPRIATE REPRESENTATIVES TO THE INDIAN WORK GROUP AND PROVIDE THEM WITH ADEQUATE TIME AND RESOURCES NEEDED TO CARRY OUT THE IWG'S RESPONSIBILITIES UNDER THE DIRECTION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS.

The Indian Work Group, (IWG) chaired by the Director of the Office of Federal Activities, will be an important entity for consolidating the experience and advice of the key Assistant and Regional Administrators on Indian Policy matters. It will perform the following functions: identify specific legal, policy, and procedural impediments to working directly with Tribes on reservation problems; help develop appropriate guidance for overcoming such impediments; recommend opportunities for implementation of appropriate programs or pilot projects; and perform other services in support of Agency managers in implementing the Indian Policy.

The initial task of the IWG will be to develop recommendations and suggest priorities for specific opportunities for program implementation in the first year of operations under the Indian Policy and this Guidance.

To accomplish this, the General Counsel and each Regional and Assistant Administrator must be actively represented on the IWG by a staff member authorized to speak for his or her office. Further, the designated representative(s) should be afforded the time and resources, including travel, needed to provide significant staff support to the work of the IWG.

3. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD UNDERTAKE ACTIVE OUTREACH AND LIAISON WITH TRIBES, PROVIDING ADEQUATE INFORMATION TO ALLOW THEM TO WORK WITH US IN AN INFORMED WAY.

In the first thirteen years of the Agency's existence, we have worked hard to establish working relationships with State Governments, providing background information and sufficient interpretation and explanations to enable them to work effectively with us in the development of cooperative State programs under our various statutes. In a similar manner, EPA managers should try to establish direct, face-to-face contact (preferably on the reservation) with Tribal Government officials. This liaison is essential to understanding Tribal needs, perspectives and priorities. It will also foster Tribal understanding of EPA's programs and procedures needed to deal effectively with us.

4. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD ALLOCATE RESOURCES TO MEET TRIBAL NEEDS, WITHIN THE CONSTRAINTS IMPOSED BY COMPETING PRIORITIES AND BY OUR LEGAL AUTHORITY.

As Tribes move to assume responsibilities similar to those borne by EPA or State Governments, an appropriate block of funds must be set aside to support reservation abatement, control and compliance activities.

Because we want to begin to implement the Indian Policy now, we cannot wait until FY 87 to formally budget for programs on Indian lands. Accordingly, for many programs, funds for initial Indian projects in FY 85 and FY 86 will need to come from resources currently planned for support to EPA-and State-managed programs meeting similar objectives. As I stated earlier, we do not expect to resolve all problems and address all environmental needs on reservations immediately. However, we can make a significant beginning without unduly restricting our ability to fund ongoing programs.

I am asking each Assistant Administrator and Regional Administrator to take measures within his or her discretion and authority to provide sufficient staff time and grant funds to allow the Agency to initiate projects on Indian lands in FY 85 and FY 86 that will constitute a respectable step towards implementation of the Indian Policy.

5. ASSISTANT AND REGIONAL ADMINISTRATORS, WITH LEGAL SUPPORT PROVIDED BY THE GENERAL COUNSEL, SHOULD ASSIST TRIBAL GOVERNMENTS IN PROGRAM DEVELOPMENT AS THEY HAVE DONE FOR THE STATES.

The Agency has provided extensive staff work and assistance to State Governments over the years in the development of environmental programs and program management capabilities. This assistance has become a routine aspect of Federal/State relations, enabling and expediting the States' assumption of delegable programs under the various EPA statutes. This "front end" investment has promoted cooperation and increased State involvement in the regulatory process.

As the Agency begins to deal with Tribal Governments as partners in reservation environmental programming, we will find a similar need for EPA assistance. Many Regional and program personnel have extensive experience in working with States on program design and development; their expertise should be used to assist Tribal Governments where needed.

6. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD TAKE ACTIVE STEPS TO ALLOW TRIBES TO PROVIDE INFORMED INPUT INTO EPA'S DECISION-MAKING AND PROGRAM MANAGEMENT ACTIVITIES WHICH AFFECT RESERVATION ENVIRONMENTS.

Where EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments. Agency managers should make a special effort to inform Tribes of EPA decisions and activities which can affect their reservations and solicit their input as we have done with State Governments. Where necessary, this should include providing the necessary information, explanation and/or briefings needed to foster the informed participation of Tribal Governments in the Agency's standard-setting and policy-making activities.

7. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD, TO THE MAXIMUM FEASIBLE EXTENT, INCORPORATE TRIBAL CONCERNS, NEEDS AND PREFERENCES INTO EPA'S POLICY DECISIONS AND PROGRAM MANAGEMENT ACTIVITIES AFFECTING RESERVATIONS.

It has been EPA's practice to seek out and accord special consideration to local interests and concerns, within the limits allowed by our statutory mandate and nationally established criteria and standards. Consistent with the Federal and Agency policy to recognize Tribal Governments as the primary voice for expressing public policy on reservations, EPA managers should, within the limits of their flexibility, seek and utilize Tribal input and preferences in those situations where we have traditionally utilized State or local input.

We recognize that conflicts in policy, priority or preference may arise between States and Tribes as it does between neighboring States. As in the case of conflicts between neighboring States, EPA will encourage early communication and cooperation between Tribal and State Governments to avoid and resolve such issues. This is not intended to lend Federal support to any one party in its dealings with the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the interests of both.

Several of the environmental statutes include a conflict resolution mechanism which enables EPA to use its good offices to balance and resolve the conflict. These procedures can be applied to conflicts between Tribal and State Governments that cannot otherwise be resolved. EPA can play a moderating role by following the conflict resolution principles set by the statute, the Federal trust responsibility and the EPA Indian Policy.

8. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD WORK COOPERATIVELY WITH TRIBAL GOVERNMENTS TO ACHIEVE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS, CONSISTENT WITH THE PRINCIPLE OF INDIAN SELF-GOVERNMENT.

The EPA Indian Policy recognizes Tribal Governments as the key governments having responsibility for matters affecting the health and welfare of the Tribe. Accordingly, where tribally owned or managed facilities do not meet Federally established standards, the Agency will endeavor to work with the Tribal leadership to enable the Tribe to achieve compliance. Where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as we do to noncompliance by the private sector off-reservation.

Actions to enable and ensure compliance by Tribal facilities with Federal statutes and regulations include providing consultation and technical support to Tribal leaders and managers concerning the impacts of noncompliance on Tribal health and the reservation environment and steps needed to achieve such compliance. As appropriate, EPA may also develop compliance agreements with Tribal Governments and work cooperatively with other Federal agencies to assist Tribes in meeting Federal standards.

Because of the unique legal and political status of Indian Tribes in the Federal System, direct EPA actions against Tribal facilities through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Regional Administrators proposing to initiate such action should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel. In emergency situations, the Regional Administrator may issue emergency Temporary Restraining Orders, provided that the appropriate procedures set forth in Agency delegations for such actions are followed.

9. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD BEGIN TO FACTOR INDIAN POLICY GOALS INTO THEIR LONG-RANGE PLANNING AND PROGRAM MANAGEMENT ACTIVITIES, INCLUDING BUDGET, OPERATING GUIDANCE, MANAGEMENT ACCOUNTABILITY SYSTEMS AND PERFORMANCE STANDARDS.

In order to carry out the principles of the EPA Indian Policy and work effectively with Tribal Governments on a long-range basis, it will be necessary to institutionalize the Agency's policy goals in the management systems that regulate Agency behavior. Where we have systematically incorporated State needs, concerns and cooperative roles into our budget, Operating Guidance, management accountability systems and performance standards, we must now begin to factor the Agency's Indian Policy goals into these same procedures and activities.

Agency managers should begin to consider Indian reservations and Tribes when conducting routine planning and management activities or carrying out special policy analysis activities. In addition, the IWG, operating under the direction of the Assistant Administrator for External Affairs and with assistance from the Assistant Administrator for Policy, Planning and Evaluation, will identify and recommend specific steps to be taken to ensure that Indian Policy goals are effectively incorporated and institutionalized in the Agency's procedures and operations.

Attachment

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

Colville Confederated Tribes
P.O. Box 150 · Nespelem, Washington 99155 (509) 634-4711

May 25, 1989

The Honorable Barbara Mikulski
Chairman, Committee on Appropriations
Subcommittee on HUD-Independent Agencies
United States Senate
123 Dirkson Senate Office Building
Washington, D.C. 20510-6025

Dear Ms. Mikulski,

I am writing concerning the Environmental Protection Agency's implementation of its Policy for Environmental Programs on Indian Lands.

The Confederated Tribes of the Colville Reservation (hereafter referred to as the Colville Tribes) is composed of eleven bands consolidated on one reservation in 1872. It has about 7500 members and is governed by the fourteen member Colville Business Council. The Colville Tribes have been involved with EPA for nine years in several environmental media programs including water, air, and hazardous waste and have developed comprehensive environmental regulatory programs for the 1.4 million acre Colville Indian Reservation in north central Washington State. In 1985 the Colville Tribes adopted a water quality management program developed under Section 208 of the Clean Water Act.

Tribal environmental policy is established by the Colville Environmental Quality Commission composed of four members of the Colville Business Council and five professional staff members. Current tribal environmental programs are administered by the Tribes Environmental Trust Department. These include water quality monitoring and planning activities, non-point source enforcement programs for forest practices, mining, and on-site wastewater, and coordinating the underground injection and underground storage tank programs with EPA. The Tribe is taking the lead role in water quality monitoring and planning activities for F.D. Roosevelt Lake, Washington State's largest lake. This is a cooperative effort involving the State of Washington, three federal agencies, and several counties. The Department's Environmental Health Division coordinates Safe Drinking Water Act and hazardous waste (RCRA/SARA) activities with EPA, state, and local governments. In addition, the Tribe's Fish & Wildlife Department is involved in the Washington State "TFW" (Timber, Fish, Wildlife) non-point source control forest practices fisheries enhancement program off reservation. The Colville Tribe's environmental programs are funded by a combination of tribal, BIA, and IHS funds with supplements from special project grants (such as state 205j federal pass-through money). The Tribe is not now slated to receive any money from EPA for FY 90 or 91. (See Attachment A, Department of Environmental Trust organizational chart).

The Colville Tribe has through first hand experience gained insight over the years into some of the problems EPA has in dealing with tribes. We met repeatedly over the years with agency personnel at both headquarters and regional levels and have made these problems known. We have spent tens of thousands of dollars developing comments on EPA policies and regulations. Unless EPA is directed by Congress and the President to do something about helping Indian tribes deal with their environmental problems, EPA's Indian Policy will fail and Indians will continue to be treated as second class citizens with respect to environmental quality. This is the reason we feel compelled to submit this testimony to the committee.

EPA's problem in working with Indian tribes to implement federal regulatory programs in Indian country fall into two categories:

1.) Lack of agency personnel directed and committed to provide technical assistance to individual tribal governments to develop programs and implement them.

2.) Complete lack of or insufficient funding to inventory problems, develop tribal infrastructure, and implement environmental programs on Indian reservations.

To be fair, there have been some minor improvements on EPA's part such as the agency's Indian communications plan. There has been increased information flow between the environmental media programs, the EPA Indian Coordinators and individual tribes. The Colville Tribes is now receiving most program and regulatory comment notifications in a timely manner. Minor technical assistance is also easier to obtain due primarily to the presence of an Indian Health Service environmental specialist working at EPA Region Ten. We are also receiving some technical assistance with our UIC program from an EPA hired consultant.

Problems arise, however, when we request EPA to take some action. In 1986 the Tribe requested EPA Region Ten to rewrite an NPDES permit for an activity on the Reservation which was causing a stream temperature increase. The old permit had been written by the State of Washington. Since that time nothing has happened and the receiving water, Omak Creek, has continued to be degraded. EPA used excuses such as "If we did it for your tribe we'd have to do it for all tribes in the region". And, "We can't issue a permit until tribal water quality standards are approved". The state waste-water permit violated both the Tribes' and the State's water quality standards (assuming they were applicable). Instead of rewriting a simple discharge permit, EPA generated excuses, delays, and meetings. The Colville Tribes spent thousands of scarce dollars to resolve this issue and all the Tribe received was bureaucratic run around. We have continued to experience even more excuses and delays from EPA in adopting our water quality standards. (See Attachment B, WQS chronology).

Through this and other experiences our Tribe has had the message has come through loud and clear that EPA is not equipped to fulfill their responsibilities on Indian lands. There are well meaning people within EPA who want to do more, but they have neither the time nor the funds to do the job. It should be noted, however, that EPA has structured itself to promulgate regulations and delegate program operation and primary enforcement responsibility to state agencies. EPA, as currently structured, is simply not capable of operating programs on Indian reservations for which it has authority; nor is it capable of equipping tribes to develop and enforce federally mandated programs.

With respect to funding Indian environmental programs the picture is even more bleak. Most, if not all, Tribes need to perform environmental quality management, planning and monitoring activities as well as build up their regulatory infrastructures. Most of our major water quality problems on the Colville Reservation (that we know of) are non-point source generated. We have lakes and streams that are being degraded by various land use activities (logging, grazing, farming, road building). We were hoping to obtain some Section 106 money to perform a non-point source assessment (required under Section 319 of the Water Quality Act). EPA had $149,000 for Section 106 grants for the entire Region Ten! That works out $5700 per Tribe for just the tribes in the State of Washington. Tribal requests totaled $850,000. I am certain some tribes elected not to submit proposals due to the ludicrous funding levels. The Colville Tribe's proposal was turned down (See Attachment C letter to Mel Tonasket from Robert Burd).

The Tribe also has unmet needs for sewage treatment. In its January '89 report to Congress entitled, "Indian Wastewater Treatment Needs and Assistance" EPA states that $30 million have been set aside for Indian needs for FY 87-90. EPA goes on to estimate that the need for residential facilities alone totals $270 million. They did not attempt to quantify needs associated with industry and commercial sources.

The Colville Business Council is concerned that if we cannot address some of our more serious environmental problems the Tribe will be the target of citizen suits. A precedent for this has already been set in the "Blue Legs" case, 668 F Supp. 1327 (D.S.D. 1987). Another alternative would be for the Tribe to bring suit against EPA and BIA for failure to fulfill their trust obligations to protect the reservation environment.

This is not to say that we expect the federal government to do our job for us. Quite the contrary. The Colville Confederated Tribes believes in self-determination, in solving our own problems. It is abundantly clear that Indian tribes are being treated unfairly by EPA. Over the last twenty years the states have received hundreds of millions of federal dollars with which to build up their environmental regulatory infrastructures. They have received billions of federal dollars with which to solve their environmental problems. The very nature of environmental problems - their complexity and expense - mandates extensive federal involvement and leadership. Indian Tribes are now placed in the position of playing catch up with meager funding and technical support, of dealing with some EPA staff who treat tribes like special interest groups rather than governments. In sum we just need the tools to solve our problems.

Over the past three years we have seen various proposals for improving EPA Indian policy implementation put forth by individual tribes and several Indian organizations. The most recent of these was that submitted by the Northwest Indian Fish

Commission. The proposal calls for $25 million nation wide, $6 million for Washington state, and 24 FTE's. We support this proposal as long as the $6 million is available to all 26 federally recognized tribes in Washington state. This would begin to rectify some of the problems we have been experiencing over the years.

Sincerely,

COLVILLE CONFEDERATED TRIBES

Gene H. Joseph
Gene H. Joseph, Chairman
Colville Environmental
Quality Commission

GHJ:kr

Attachments (3)

cc: file

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Outline for Implementing an EPA Indian Policy

FROM: Allan Hirsch, Director
Office of Federal Activities, (A-104)

TO: Josephine Cooper, Special Assistant
to the Administrator for External Affairs (A-100)

Introduction. The following outline provides a detailed description of the sequence of events to be followed by the Agency in implementing an Indian policy to involve tribal governments in environmental programming. The proposed sequence begins with "housekeeping" work, i.e. removing legal and procedural obstacles program managers face in efforts to work with tribal governments. It's aim, and timing, is to put programs in place on the most critical reservations within a five-year time frame.

I. Year One.

The first year emphasizes getting the EPA "house in order," that is, concentration on major regulation changes and development of the most essential interim guidances. The in-house effort will, however, be supplemented with a special intiative to establish outreach to tribal governments and bring on line two or three "pilot" programs to serve as representative examples for other tribes as they develop programs in subsequent years. The tasks and approach for the first year effort are described as follows:

A. Tasks. The first-year tasks are divided into three basic groups:

(1) Of the 27 delegable programs and/or program elements which will need adaptation to Indian reservations, we plan to begin work with six to eight "core" programs which are most active in terms of tribal interest and pressure for EPA action.

We project that this task will require revisions to 10 - 12 regulations, including generic regulations, and the development of a corresponding number of policy guidances, as discussed under "Methodology," below.

(2) Concurrently, we will begin revising EPA's internal planning processes (such as the annual budget and management accountability systems) to account for reservation needs. This effort, too, will be carried out through IWG task forces and will be coordinated with the work of the media-specific task forces. Part of this effort is to encourage program managers to make FY 84 grant funds available to tribal applicants, within the limits of their existing discretion.

(3) Also, concurrent with Task (1), we will undertake a special initiative to serve two primarly functions: a) to provide timely outreach to tribal governments, and b) to develop two or three pilot tribal programs to provide carefully-designed examples for the main influx of programs to follow. This initiative will allow EPA to demonstrate progress towards the emplacement of actual reservation programs in the first year.

Candidate pilot programs include:

a) Large-scale, cross-media Tribal Program; equivalent to a state's program (e.g. Navajo);

b) Small-scale, cross-media Tribal Program, adapted to the particular needs of small tribes (e.g. Ft. Peck);

c) Consortium; a regualtory scheme combining program functions for several small tribes (e.g. All Indian Pueblo Council);

d) State/Tribal Program; a carefully designed and negotiated program with state and tribe sharing component program responsibilities (e.g. Menominee Tribe and State of Wisconsin).

B. Methodology. Although the work of the first year will deal with both internal and external issues, the primary one for us will be on the resolution of EPA's internal "housekeeping" problems under the "core" programs. A lower level of effort will be directed to external relations and problems brought to the Agency for ad hoc resolution. More specifically, these components will include the following steps:

(i) "Core" Programs. Indian Work Group (IWG) task forces will be organized to deal with each of the following "core" program areas: (a) Public Water Supply (PWS) and (b) Underground Injection Control (UIC) under the Safe Drinking Water Act, (c) Prevention of Significant Deterioration (PSD) and (d) SIP development under the Clean Air Act, (e) the National Pollutant Discharge Elimination System (NPDES) and (f) water quality planning and standard setting activities under the Clean Water

Act, (g) Hazardous Water Disposal under the Resource Conservation and Recovery Act, and (h) Superfund. These task forces will each have representation from OFA, program offices and selected regions with additional support from OGC, OEA, OPRM and other offices, as appropriate.

Each of the task forces will review the Agency's past activities with tribes under each specific program and determine the legal and other impediments that have impaired our ability to work with tribal governments. Each task force will then suggest a plan of action for resolving those impediments. Particular attention will be paid to determine what legal barriers must be overcome and whether the identified problem can be corrected through regulation changes or will require statutory amendment.

The IWG task forces will have as a model the precedent set by the Office of Pesticide Programs (OPP) when they amended their regulations and status (40 CFR 171 and Section 28 of FIFRA) to allow delegation and funding to tribal governments.

(2) External Issues. While the core task forces are organizing and beginning the identification and evaluation of program impediments, we will work simultaneously on cross-cutting issues as follows:

(a) OFA and the Regional IWG representatives will undertake a liaison effort with tribal governments and national Indian organizations to present the new EPA policy and explain EPA delegable programs of potential interest to tribal governments. This effort will emphasize the eight "core" programs and will involve solicitation of tribal input for use by the "core" task forces in designing and proposing recommendations for changes in regulations and/or statutes.

(b) OFA and Regional IWG representatives will continue working with tribes and program offices on environmental and administrative problems that arise under the other twenty delegable programs or program elements.

(c) OFA and the regional IWG representatives will also begin work on the special initiatives. This will include selection of Indian organizations to help with the outreach and technical assistance efforts.

(3) Mid-year Report. Upon completion of the first six months of work, OFA will develop a mid-year report to provide findings and interim guidance, including, for example, detailed approaches to necessary rule changes and changes in management and planning systems. As appropriate, the report will also propose priorities and deadlines.

(4) Second Six Months. In the latter half of the first year, we expect to build on the progress of the first half year, shifting emphasis to pilot program efforts and initiating new steps as follows:

(a) Based upon the Mid-year Report,

(1) The task forces (with the primary effort coming from the HQ program office representatives) will follow EPA's procedures for amending regulations and statutes.

(2) Regional offices will make adjustments, if appropriate, in the design of pilot programs being negotiated under the special initiative between the regions and selected tribes; and

3) Program-specific task forces will develop Interim Guidelines to deal with the specific problems of program implementation under existing legal constraints as described on p. 52-5 of the Discussion Paper.

(b) OFA and the regional IWG representatives will intensify their activities in a liaison capacity, both educational and advisory, dealing with specific problems of program implementation. This is expected to result from a growing awareness of the IWG effort and growing interest on the part of the Indian community, EPA program managers and other federal agencies.

(c) OFA will undertake liaison with other federal agencies, notably the Bureau of Indian Affairs (BIA), the Indian Health Service (IHS) and the Administration for Native Americans (ANA), to develop and coordinate support from these agencies to aid and supplement EPA efforts in dealing with Indian tribes and reservations.

C. Cost. Increased Program office level of effort plus OFA: 4.5 FTE (increase); Regions: 4.0 FTE (increase); Contract funds: $595K: Grant funds: no new funds or target set for reallocation in FY 84 (see attached chart).

II. Year Two.

In the second year of this effort, we project that the bulk of the housekeeping tasks (regulations, guidance, etc.) will have been completed for the "core" delegable programs, with the exception of necessary legislative changes. Accordingly, the Agency's emphasis will shift to the regions and work with tribal governments in the design and development of reservation programs.

A. Tasks. The second year tasks will fall into four basic areas, covering the transition from planning and preparation to development of reservation programs:

(1) Regional program managers work with tribal governments on the development of specific reservation programs. We project that 10-12 tribes will show substantial program towards program development.

(2) Continued encouragement to program managers to make more grant funds available in FY 85 with a target to be set at 1% of the abatement, control and compliance funds available for state and local programs (the 1% figure represents a gradual "phasing-in" of the target set aside recommended on p. 44 of the Discussion Paper).

(3) Continuation of the "housekeeping" activities developing regulation changes and guidance packages for an additional 12 delegable programs.

(4) Continuation of the special initiative begun in the first year.

B. Cost. No change in program total effort (the change is in emphasis from Task Force effort to implementation effort). OFA: Reduction of 1 FTE: Regions: 6 additional FTE (Total; 6.0 FTE increase above from Year One); Contract funds: $395K; Grant funds: reallocation of grant funds, with a target set at 1% of grants for state and local programs. (See attached chart).

III. Year Three.

This year should see the substantial completion of the in-house "housekeeping" tasks designed to support programs managers in dealing directly with tribal governments, and the most intense activity will involve working directly with tribes.

A. Tasks.

(1) Headquarters activities will envolve into ongoing responsibilities such as providing liaison with national Indian organizations and the Bureau of Indian Affairs, providing generic technical assistance to regions and programs, providing Indian-specific input into new statute and regulation packages, and advising the Administrator of significant activities and/or changes in Indian environmental matters requiring Agency attention and action.

(2) Regional program managers will be at the peak of their activity in bringing new reservation programs on line. An estimated 18 tribes will be actively involved at various stages of significant program development.

B. Cost. OFA: Reduction of 1 FTE; Regions: Regional Program Offices will begin to absorb the 10 Indian Regional FTES; Contract funds: $150K; Grant funds: As recommended on p. 44 of the Discussion Paper, a specific target is established for an Indian set-aside for funding support to tribal programs, adequate to ensure that all EPA programs are actively involved in promoting EPA policy to involve tribal governments in the regulatory process. (See attached chart).

IV. Fourth and Fifth Years

The goal for Regional program managers is to complete necessary negotiations and program development activities with 75% of the major tribes, putting programs in place on 20-25 reservations. Any new, major programming activities for other tribes will be expected to continue at a trickle, with most of the remaining regional activity expended on programs having with relatively minor tribal involvement, programs for smaller reservations, and/or programs for reservations with lesser environmental problems. Funding resources in FY 87 and 88 will not be based on target figures; projections for these funding needs will become integrated into the normal budget planning process.

3-YEAR SUMMARY

INDIAN PROGRAM COSTS

	FY 84	FY 85	FY 86
OFA	+4.5 FTE (Total: 6.0)	- 1.0 FTE (Total: 5.0)	- 1.0 FTE (Total: 4.0)
Regions IV - X Increase ( ) FTE	+ 3.0 FTE (Total:4.0)	+ 6.0 FTE (Total: 10)	0 (Total: 10) See Footnote 1
HQ Program Offices	See Footnote 1	See Footnote 1	See Footnote 1
"Contract" Funds (Special Initiative)	$595,000	$395,000	$150,000
Grant Funds Abatement, Control and Compliance)	See Footnote 2	See Footnote 3	See Footnote 3

1. Headquarters program offices have staff in place, now assigned to "state" delegation and liaison functions. These staff are already expending time on the special problems of delegation and program coverage on Indian lands. No increase in headquarters-program office staff is anticipated for dealing with Indian issues. Starting in FY 86 the 10 Regional FTE will begin to be absorbed into the appropriate Regional Program Offices.

2. In the first year, the existing pressure for grant funds tribes will increase. Any response in FY 84 will require reallocation of existing funds by headquarter and regions. This can be encouraged, but no new funds are proposed other than those for the Special Initiative.

3. The July 1983 Discussion Paper deals with the issue of Abatement, Control and Compliance funds for growth tribes at some length. On page 44 of that paper, we recommend that a specific target figure be established for such funds (we recommend 2% of the annual figure for state program grants as an appropriate beginning. That amount will not meet total projected need but is sufficient to demonstrate a good faith effort and cover the most important cases). In FY 85, however, the Agency will have spent one year working to remove impediments to working with tribes in the "core" areas and will be starting to shift emphasis to the tribes themselves. Accordingly, a set aside will be appropriate, but the entire target figure may not be necessary. A "phasing in" to the final target figure in the second year might only require an allocation of 1% of state program funds to be set aside for tribes in FY 85.

COOPERATIVE AGREEMENT
BETWEEN
THE U.S. ENVIRONMENTAL PROTECTION AGENCY
AND
THE CONFEDERATED TRIBES
OF THE COLVILLE RESERVATION
REGARDING IMPLEMENTATION OF THE
COLVILLE WATER QUALITY MANAGEMENT PROGRAM

This COOPERATIVE AGREEMENT ("Agreement") dated March 13, 1986, between the Confederated Tribes of the Colville Reservation ("Tribes") by and through the Colville Business Council, and the United States Environmental Protection Agency ("EPA") by and through the Regional Administrator of EPA Region X, provides for implementation of the Federal Clean Water Act and the Tribal laws which comprise the Colville Water Quality Management Program ("CWQMP") on the lands of the Colville Indian Reservation ("Reservation"). As referred to in this Agreement, Reservation includes those lands encompassed in the definition of Indian country found at 18 U.S.C. Section 1151.

1. Recitals

1.1 The Colville Confederated Tribes. The Tribes is a federally recognized Indian Tribe residing upon a Reservation established by Executive Order of July 2, 1872 as amended by the Act of July 1, 1892, 27 Stat. 62.

1.1.1 The Tribes asserts sovereign regulatory jurisdiction over all activities which may impact the surface or ground water resources of the Reservation.

1.1.2 The Tribes is organized under a Constitution and By-Laws approved by the Secretary of the Interior in 1938, pursuant to the Indian Reorganization Act of 1934 (25 U.S.C. Section 461 *et seq*).

1.1.3 Under its Constitution, the Business Council, among other things, is authorized to: negotiate with federal, state and local governments; promulgate and enforce ordinances; protect and preserve the property, wildlife and natural resources of the Tribes; regulate trade and the use of property; and protect the health and general welfare of all persons who reside on or otherwise come upon the Reservation ("Reservation population").

1.1.4 The Tribes acting through its Business Council has power to enter into and implement this Agreement.

1.2 Environmental Protection Agency. EPA is responsible for implementing the federal Clean Water Act. 33 U.S.C. Section 1251 et seq.

1.2.1 Under the Clean Water Act, the Regional Administrator of EPA Region X approved the State of Washington's Certification of the CWQMP. EPA's approval of the State certification recognized the Colville Business Council as the governmental entity with adequate regulatory authority to be designated as Management Agency for implementation of the CWQMP. A copy of the EPA letter setting forth this understanding is attached hereto as Exhibit A and by this reference is incorporated herein.

1.2.2 In addition to its duties under the Clean Water Act, EPA's entry into this Agreement is consistent with the federal trust responsibility owed by EPA to the Tribes. Such trust responsibility was specifically recognized by the United States Court of Appeals for the Ninth Circuit in Washington v. EPA, 752 F.2d 1465 (9th Cir. 1985).

1.2.3 Current federal Indian Policy as set forth by the President in his Indian Policy Statement of January 24, 1983 further supports tribal self-government. The Agency has acknowledged its responsibility to Indian tribes under the federal environmental laws and published its Policy for Administration of Environmental programs on Indian Reservations (November 8, 1984).

1.2.4 EPA has the power to enter into and implement this Agreement.

1.3 The Colville Water Quality Management Program. On January 18, 1985 the Business Council, acting on behalf of the Tribes, adopted Resolution No. 1985-20 which enacted the CWQMP into Tribal law.

1.3.1 Implementation of the CWQMP will protect and preserve the water resources and quality of the Reservation environment. The CWQMP is a comprehensive water quality management program applicable to all lands and all activities taking place on the Reservation which may impact surface or ground water quality.

1.3.2 The CWQMP includes the following Titles of the Colville Tribal Code:

a. Title 30, the Colville On-Site Wastewater Treatment and Disposal Act;

b. Title 31, the Colville Mining Practices Water Quality Act;

c. Title 32, the Colville Forest Practices Water Quality Act;

d. Title 33, the Colville Water Quality Standards Act; and,

e. Title 35, the Colville Administrative Procedures Act.

1.4 Purposes. The Tribes and the EPA desire to achieve the goals and serve the policies described in Sections 1.4.1 - 1.4.6 below, and in furtherance of these mutual goals and policies this Agreement is intended to:

a. Establish a framework for intergovernmental cooperation for implementation of the CWQMP;

b. Conserve, Tribal and EPA monetary and program resources necessary to implement the CWQMP;

c. Recognize the Tribes as a sovereign legal entity with joint interests in protecting and enhancing the environmental quality of the Reservation; and

d. Implement the special government-to-government relationship between the Federal Government and the Tribes.

1.4.1 Tribal Health and Welfare. The parties desire to protect and preserve the health and welfare of the Reservation population and the property, wildlife and natural resources of the Reservation. In order to accomplish this goal *effective* point and non-point source water pollution control on and off the Reservation is mandatory. The absence of effective water pollution control programs poses a threat to quality of the Reservation environment including: public health and welfare; natural resources; livestock; and surface and ground water.

1.4.2 Tribal Economic Development. The parties desire to protect the Tribes' interest in controlling pollution of the pristine water resources and reserved water rights of the Tribes so that the potential for attracting job producing industry to the Reservation is preserved. The parties recognize that protection of the Reservation environment will enable the Tribes to enhance on-Reservation economic opportunities such as: recreational development; fishery enhancement; mineral development; timber production;

agriculture and grazing. Implementation of the CWQMP will enable the Tribes to more effectively protect its reserved water rights as well as the Tribes' reserved ownership rights in the quality of the Reservation environment.

1.4.3 Tribal Self-Government. The parties desire to further Tribal self-government and the special government-to-government relationship between Tribal government and the Federal Government. The President affirmed the importance of these twin themes, in his 1983 Indian Policy Statement, and emphasized that the policy of the Federal Government is to:

a. further pursue the policy of self-government for Indian tribes;

b. recognize that tribal governments have primary responsibility for meeting the needs of reservation populations;

c. affirm the right of tribal governments to establish and run programs to meet their needs; and

d. enable tribal governments to resume control over their own affairs.

1.4.4 EPA Indian Policies and Programs. In December, 1980, EPA adopted the policy of managing its national environmental regulatory and grant programs in response to the particular legal and political circumstances of Indian tribes. The thrust of this policy was to ensure that EPA programs protected human health and the environment at least as effectively on Indian reservations as elsewhere and to promote and enhance the role of tribal governments in the implementation of federal environmental programs on Indian reservations. In November, 1984 EPA issued its formal Indian Policy Statement and Guidance regarding implementation of federal environmental laws within Indian reservations. This Agreement is consistent with EPA's responsibility to coordinate water quality management programs under the Clean Water Act.

1.4.5 EPA Jurisdiction Over "Indian Lands." It is the position of EPA that under the Clean Water Act, "Indian lands" are defined as all lands within the exterior boundaries of an Indian reservation regardless of ownership, 40 CFR Section 35.1521-6(a)(1), dependent Indian communities, and Indian allotments to which Indians hold title. Moreover, EPA has determined that, in general, Federal law and policy preclude the Agency from delegating its implementation and enforcement authority over Indian lands to a state except where Congress has expressly delegated civil regulatory jurisdiction to a state. EPA shall therefore retain its regulatory and program jurisdiction over Indian lands under the Clean Water Act and directly implement applicable Federal environmental programs on the Reservation. The EPA's Indian Policy provides that the Agency shall continue to retain jurisdiction over Indian lands pursuant to the federal environmental laws until such future time as:

a. the Tribes requests that EPA, either by delegation or other means, provide for the transfer of one or more of the Agency's regulatory programs or functions to the Tribes;

b. The Tribes is willing and capable of assuming responsibility for the implementation and enforcement of such regulatory programs or functions; and

c. the assumption and enforcement by the Tribes of such regulatory programs or functions would insure compliance with applicable Federal standards and would otherwise be consistent with Federal law and policy.

1.4.6 EPA/Tribal Environmental Programs. EPA recognizes that the Tribes intends to develop and implement environmental regulatory programs in addition to the CWQMP and that the development of such further Tribal laws and programs would be consistent with Federal Indian Law and Policy and will further the goals and policies set forth above in paragraphs 1.4.1 - 1.4.5.

2. Terms of Agreement

NOW THEREFORE, the parties agree as follows:

2.1 EPA Assistance to Tribes.

2.1.1 Development of the CWQMP. Pursuant to the Clean Water Act, EPA has provided grant funding and technical assistance to the Tribes. Such assistance has enabled the Tribes to develop the CWQMP, work toward development of this Cooperative Agreement, and proceed with implementation of the CWQMP in accordance with Federal and Tribal law. EPA funding to the Tribes has also enabled the Tribes to demonstrate to EPA that the Business Council has adequate legal authority and capability to effectively implement and enforce the CWQMP and that the Business Council satisfies the Management Agency requirement for plan approval set forth in 40 CFR Subpart G. See Exhibit A.

2.1.2 Implementation and Enforcement of the CWQMP. To ensure that the purposes and intent of the Clean Water Act are met on the Reservation and to further ensure that the

CWQMP is fully implemented and enforced so that applicable Water Quality Standards ("WQS") are attained and maintained, EPA hereby agrees to take the following further action pursuant to the Clean Water Act:

a. Tribal Water Quality Standards. Pursuant to Section 303 of the Clean Water Act and 40 CFR Part 131 EPA shall review Tribal Water Quality Standards ("TWQS"), adopted as Tribal law under the CWQMP, and upon determining that the TWQS are consistent with the Clean Water Act, promulgate the TWQS as Federal Water Quality Standards for the Reservation. See, Memorandum from Catherine A. Winer to Peyton Davis, re: EPA's Responsibilities Under the Clean Water Act with Respect to Tribal Submission of Water Quality Standards for Water Quality Management Plans (March 16, 1984). A copy of this Memorandum is attached hereto as Exhibit B and by this reference incorporated herein.

b. Outstanding NPDES Permits. To the extent possible under budgetary and resource constraints, review all outstanding NPDES Permits issued either by EPA or the State of Washington for pollution sources on or adjacent to the Reservation, and replace all NPDES Permits with NPDES Permits issued by the EPA. EPA has determined that such action is required under the Clean Water Act, and has further determined that the State of Washington does not possess adequate civil environmental regulatory jurisdiction over sources of water pollution on the Reservation. See Exhibit B and 40 CFR Part 121, Subparts A and C.

c. New NPDES Permits. Directly issue all new revised, modified, or re-issued NPDES Permits for point sources of water pollution on the Reservation and in a timely manner provide the Tribes with the following:

i. Copies of all applications received by EPA for NPDES Permits for on-Reservation point sources;

ii. Pre-Draft copies of all proposed NPDES Permits for on-Reservation point sources;

iii. Copies of all public notices published by EPA for final draft NPDES Permits and copies of all final draft NPDES Permits for on-Reservation point sources; and

iv. Notice of EPA's preliminary determination regarding Section 401 Certification of all proposed NPDES Permits for on-Reservation point sources.

d. Grant Funding. To the extent possible under budgetary and resource constraints, and within the context of EPA administered programs, assist the Tribes in implementing its cooperative certification and enforcement program through grants-in-aid and other appropriate financial mechanisms.

e. Technical Assistance. To the extent possible under budgetary and resource constraints and within the context of EPA administered programs, provide technical assistance to assist the Tribes in its review and consideration of such future environmental problems which may be beyond the Tribes' expertise or funding capabilities. Such assistance could take the form of laboratory analysis of samples, expert advice on environmental problems, and/or field trips and training seminars for Tribal personnel.

f. Emergency Response Training. To the extent possible under budgetary and resource constraints, and within the context of EPA administered programs, provide environmental emergency response training and technical assistance for tribal personnel.

g. Tribal/EPA Agreement for FY-87. Designate Region X staff to work with the Tribes toward the development of a Tribal/EPA Agreement for FY-87. Upon designation by the Regional Administrator such person(s) shall promptly contact the Chairman of the Colville Environmental Quality Commission ("CEQC") to establish a timetable for the development of such an Agreement. The Tribal/EPA Agreement shall be prepared on an annual basis and shall be prepared in accordance with EPA regulations and policy regarding State/EPA Agreement.

2.2 Tribal/State Water Quality Agreement. On August 13, 1985, the Tribes and the State of Washington entered into a separate Tribal/State Water Quality Agreement regarding implementation of the CWQMP, a copy of which is attached hereto as Exhibit C. The August 13, 1985 Agreement between the Tribes and the State is separate and apart from this Agreement and the two are in no way interdependent. The suspension or termination of the August 13, 1985 Agreement between the Tribes and the State will not impact or otherwise affect the validity of this Agreement between the Tribes and the EPA.

2.3 Implementation of CWQMP. The Tribes and EPA acknowledge the desirability of the Tribes' implementation of the CWQMP. The Tribes and EPA hereby agree to make good faith efforts to work cooperatively and to consult regularly in accordance with this Agreement so that the CWQMP may be implemented and enforced in full accord with the Clean Water Act. The ongoing relationship between EPA and the Tribes shall be coordinated through the EPA/Tribal Water Quality Advisory Board established pursuant to Paragraph 2.4 below. The Tribes agrees that the regulatory provisions of the CWQMP applicable to activities which take place on the Reservation will be no less stringent than Federal minimum requirements, and will be comparable, but not necessarily identical, to the regulatory provisions of the State of Washington Water Quality Management Program that would be applicable to similar off-Reservation activities operating under similar conditions. The CWQMP may be revised from time to time by the Tribes in a manner consistent with Clean Water Act and 40 CFR Subpart G.

2.4 EPA/Tribal Water Quality Advisory Board. In order to facilitate implementation of the CWQMP, an EPA/Tribal Water Quality Advisory Board is hereby established. The Board shall consist of two members of the CEQC designated by the Chairperson of the CEQC and two persons designated by the EPA Regional Administrator of EPA Region X. In addition, the Superintendent of the Colville BIA Agency shall serve as an ex-officio (non-voting) member of the Board. This Board is an independent advisory body and separate and apart from the committee or agency that was established by the August 13, 1985 Agreement between the State of Washington and the Tribes.

2.5 Effective Date, Amendment and Termination. This Agreement shall be effective when executed by both parties. This Agreement may not be amended except by written agreement executed by both parties. This Agreement shall continue in effect until terminated by joint agreement of the parties provided that either party may terminate the Agreement by giving sixty (60) days written notice to the other party.

2.6 Written Communications. Written communications pursuant to the provisions of this Agreement shall be delivered or mailed as follows:

2.6.1 To the Tribes: Chairman, Colville Business Council, Colville Confederated Tribes, P. O. Box 150, Nespelem, WA 99155, with a copy to the Chairman, Colville Environmental Quality Commission.

2.6.2 To the EPA: Regional Administrator, EPA

Region X, 1200 Sixth Avenue, Seattle, WA 98101.

2.6.3 To the BIA: Superintendent, Colville Indian Agency, Bureau of Indian Affairs, P. O. Box 111, Nespelem, WA 99155.

IN WITNESS WHEREOF the parties have executed this Agreement effective on March 13, 1986.

THE CONFEDERATED TRIBES
OF THE COLVILLE RESERVATION

By: ______________________________ ________________________
Al Aubertin, Chairman
Colville Business Council
Date

THE U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION X

By: ______________________________ ________________________
Ernesta Ballard Barnes
Regional Administrator
Region X
Date

Approved as to Form:

FOR THE TRIBES

By: ______________________________ ________________________
Richard A. Du Bey
Ziontz, Pirtle, Morisset,
Ernstoff & Chestnut
Date

By: ______________________________ ________________________
Bruce Didesch
Colville Tribes Legal Office
Date

FOR THE EPA

By: ______________________________ ________________________
Deborah Gates
Assistant Regional Counsel
Date

Colville Confederated Tribes
P.O. Box 150 · Nespelem, Washington 99155 (509) 634-4711

COLVILLE BUSINESS COUNCIL

September 12, 1988

Fletcher Shives
EPA Region X (M/S 433)
1200 Sixth Avenue
Seattle, Washington 98101

Dear Mr. Shives:

Enclosed please find the comments of the Confederated Tribes of the Colville Reservation regarding EPA's proposed rule to promulgate federal water quality standards for the Colville Indian Reservation. Although this day has been long in coming, the Confederated Tribes wishes to applaud the EPA and particularly the staff in Region X for their resolve in pushing for federal promulgation. We hope that there will not be any further delays in promulgating this rule and we can then all get on to the business of regulating the Reservation environment and protecting the water resources of the Confederated Tribes.

Sincerely yours,

Mel Tonasket
Mel Tonasket, Chairman
Colville Business Council

cc: Gene Joseph, Chairman, CEQC
Dale Kohler, Vice-Chairman, CEQC
Gary Passmore, Director, CWQMP
Bruce Didesch, Reservation Attorney

COMMENTS OF THE CONFEDERATED TRIBES
OF THE COLVILLE RESERVATION
(Confederated Tribes)

RE: EPA's Proposed Rule To Promulgate Federal Water Quality Standards For The Colville Indian Reservation - 53 F. Ed. Reg. 26968

The Administrator Has The Authority To Promulgate Federal Water Quality Standards For The Colville Indian Reservation Based Upon The Tribes' Water Quality Standards

Although the Water Quality Standards enacted by the Colville Business Council as part of the Colville Water Quality Management Program (CWQMP) in 1985 were and are enforceable as tribal law, they are not federally enforceable under the provisions of Section 303 of the Clean Water Act. 33 U.S.C. 1313. Because of the recognized need for unitary management of the waters of the Reservation, **Colville Confederated Tribes v. Walton**, 647 F. 2d 42, 52 (9th Cir.), cert. denied 454 U.S. 1092, 1981, and the State's general lack of authority over Indian lands, **William v. Lee**, 358 U.S. 217, 1959, the administrator correctly determined that promulgation of the Tribes' water quality standards as federal standards under 33 U.S.C. § 1313(c)(4)(B) was appropriate.

The Effect Of The Recent Amendments To The Clean Water Act

The recent amendments to the Clean Water Act enabling Indian tribes to be treated in the same manner as a state under most of the provisions of the Clean Water Act, 33 U.S.C. Section 1377, does not affect the authority of the Administrator to federally promulgate water quality standards. Furthermore, until the EPA finally promulgates regulations specifying how Indian tribes are going to be treated as states, the Confederated Tribes is unable to receive federal approval as contemplated by Section 303 for its standards. This promulgation is a federal proceeding and the standards to be promulgated are federal standards. Therefore, this promulgation really has nothing to do with when or whether the Confederated Tribes will qualify for treatment as a state and at some future date submit its water quality standards for approval in the same manner contemplated by Section 303 of the Act for the individual states. It must be remembered that the Confederated Tribes requested promulgation of federal standards long before Congress amended the Clean Water Act. It has taken the EPA over two years to reach this point. Since the regulations setting forth the manner in which an Indian tribe may qualify for treatment as a state mandated by Congress to be completed by August of 1988 are not yet done, any requirement that EPA should not proceed with this federal promulgation because the Confederated Tribes should wait until the regulations come out and it obtains primacy will lead to a two to three year delay in any enforcement actions on the Reservation. For example, most of the Reservation NPDES permits have long since expired and applications for renewal are currently being delayed pending federal promulgation of water quality standards for the Reservation. It is the administrator's duty to implement the goals of the Clean Water Act to protect and improve the quality of the waters of the United States. By federally promulgating water quality standards for the Colville Reservation and working directly with the Confederated Tribes to implement the Colville Water Quality Management Plan on the Colville Reservation and issue NPDES permits pursuant to those federally promulgated standards, the Administrator will be fulfilling the purposes of the Act, federal Indian policy and ensure that the Reservation waters are adequately protected.

Cavenham Forest Industries' Arguments

Cavenham suggests that the administrator should wait until the Confederated Tribes has made an adequate showing of its capability and eligibility to be treated as a state. The Agency, however, has already made a determination that the Confederated Tribes through the Colville Business Council has "adequate authority and capability to undertake effective water quality management planning." (August 28, 1985 letter from Regional

Administrator, Ernesta B. Barnes to Governor Gardner approving the Colville Water Quality Management Plan of which the water quality standards is a part.) (App. A)

Cavenham also asserts that the Indian Primacy provisions to the Clean Water Act amendments supercedes existing EPA Indian policy statements and the March 1986 Cooperative Agreement between the EPA and the Confederated Tribes. That is simply not the case. The recent amendments constitute a recognition by Congress of the validity of the legal principles that provided the basis for EPA's Indian policy statements and the 1986 Cooperative Agreement.

EPA's Indian policy has recently been questioned by Attorney General Ken Eikenberry on behalf of the National Association of Attorneys General. In a letter to administrator Lee Thomas dated March 4, 1988, Attorney General Eikenberry called for a reassessment and revision of EPA's Indian Policy. The Confederated Tribes' Office of Reservation Attorney prepared a memorandum response to Mr. Eikenberry's to administrator Thomas. A legal analysis supporting EPA's Indian Lands Policy and tribal authority to regulate the Reservation environment was prepared by the Du Bey law firm as well. Those documents are attached and incorporated into these comments by reference as **Appendix** B and **Appendix** C and underscore the correctness of EPA's Indian policy and the recent steps taken by Congress to treat Indian tribes on an equal footing with states under the various federally administered environmental protection statutes.

It is of little surprise to the Confederated Tribes that Cavenham wishes to maintain the status quo and delay the promulgation of federal standards that would then be applicable to Cavenham's activities on the Colville Indian Reservation. In 1983, the Washington Department of Ecology issued an NPDES permit to Cavenham's predecessor in interest Crown Zellerbach Corporation. That permit on its face violates the Clean Water Act. Although the point of discharge of heated non-contact cooling water from Cavenham's mill operation is discharged directly into Omak Creek, the permit lists the Okanogan River approximately one-half mile away, as the point of discharge. The State even went so far as to designate the receiving water as being the "Okanogan River via Omak Creek." **App. D.** Because of the temperature of the water being discharged into Omak Creek, the discharge violates both tribal and state water quality standards for temperature and creates a thermal barrier that prevents the propagation of fish. **App. E.** The States' refusal to categorize Omak Creek as the receiving water violates Section 301 and 502 of the Clean Water Act, 33 U.S.C. § 1311 and § 1362. Furthermore, the State's refusal to consider the impact on fisheries of discharging the hot water to Omak Creek violates Section 316 of the Clean Water Act, 33 U.S.C. § 1326.

The Fact Sheet that the Department of Ecology prepared on Cavenham's application for the renewal of Crown Z's permit is particularly telling. **App. F.** The State is only concerned about the effect of Cavenham's operation to water quality standards as they relate to the Okanogan River. Cavenham only has to take steps to eliminate the standard violations or prevent the reoccurrence if its discharge has an effect on the Okanogan River. Fact Sheet at page 5. See also **App.** D at 2. On page 4 of the Fact Sheet the State acknowledges that "while dramatic temperature increases have been noted in Omak Creek (based upon 1976 sampling) it has not been concluded that this cooling water discharge has significant impact on the temperature of the Okanogan River." The cost Cavenham would have to incur to comply with the law is perhaps the real reason it is so strenuously objecting to federal promulgation in this instance.

One Final Point Regarding Cavenham's Comments

The Confederated Tribes takes exception and EPA did not say there were no discharges causing human health or aquatic life risks due to toxic discharges. The Agency merely stated it reviewed the current discharges and did not "discover any discharges causing human health or aquatic life risks due to toxic discharges based on available agency criteria guidance." How extensive of a review that EPA performed is unknown. It certainly did not rise to the level of an analysis. While a thermal barrier may not be considered to fall under the EPA's toxic criteria, hot water is toxic to temperature-sensitive aquatic life such as salmon. See, App. E. The point of this is that EPA's statement in the federal register notice does not foreclose the possibility that toxic discharges are occurring from Reservation-based NPDES permits and certainly would not preclude the Tribes from proceeding under tribal law if a toxic discharge was discovered.

Conclusion

The Confederated Tribes applauds the efforts of the EPA in taking President Reagan's Indian Policy Statement seriously and working directly with tribes on a government-to-government basis in relation to the Reservation environment. The Confederated Tribes hopes that at some point the states and the regulated community will recognize that it is more appropriate to work together to implement EPA's policy and fulfill Congress' intent of enabling Indian tribes to be equal partners with the EPA and respective states in implementing environmental programs on that tribe's reservation. The Confederated Tribes is honored to be part of this historic effort and applauds EPA's efforts.

SEPT. 12, 1988
Date

Mel Tonasket
MEL TONASKET

APPENDIX A

AUG 2 8 1985

REPLY TO
ATTN OF: M/S 433

Honorable Booth Gardner
Governor, State of Washington
Olympia, Washington 98504

Dear Governor Gardner:

Thank you for your certification of the Colville Confederated Tribes Water Quality Management Plan. Your certification of the plan completes the requirements in the 1980 Memorandum of Agreement among the Tribes, the Washington Department of Ecology and EPA. I hereby approve the certified plan and compliment you, the Departments of Ecology, Natural Resources and other involved state agencies and the Tribes on a job well done.

The State and the Tribes have done a good job of placing environmental protection ahead of jurisdictional conflicts in developing the plan. It is essential for this cooperation to continue during the implementation phase of the plan. The implementation agreement among the Tribes, the Department of Ecology and the Department of Natural Resources provides a good basis for such cooperation.

I approve the certified plan with the understanding that the Colville Business Council is the designated management agency. The Council satisfies the management agency requirements for plan approvals set forth in 40 CFR Subpart G. The Colville Business Council has adequate authority and capability to undertake effective water quality management planning; moreover, the Tribal efforts will lead to attainment of water quality goals and be compatible with planning outside the reservation.

The certified plan is a significant accomplishment of the Tribes and the State. I realize that continuing to avoid jurisdictional conflicts in implementing the plan will not be an easy task. However, the implementation agreement should be very useful in minimizing conflicts. EPA is available to assist the Tribes and the State as appropriate in implementing the plan.

Sincerely,

L. Edwin Coate
for Ernesta B. Barnes
Regional Administrator

cc: Andrea Beatty Riniker, Director, Department of Ecology
Brian Boyle, Commissioner of Public Lands
✓Al Aubertin, Chairman, Colville Tribal Business Council

CC: Gary Passmore
L. Stone

MEMORANDUM RESPONSE TO ATTORNEY GENERAL EIKENBERRY'S MARCH 4, 1988 LETTER TO ADMINISTRATOR LEE THOMAS CALLING FOR REEVALUATION AND REVISION OF EPA's INDIAN LANDS POLICY

April 7, 1988

OFFICE OF THE RESERVATION ATTORNEY
COLVILLE CONFEDERATED TRIBES
P.O. BOX 150
NESPELEM, WA 99155

TABLE OF CONTENTS

Page

I. Introduction ---------------------------------- 2

II. EPA's Policy Is Based Upon Sound Principles Of Indian Law ---------------------- 5

III. The Current Situation On Indian Lands Is Not As Bleak As The IAWG Portrays --------- 10

IV. EPA's Indian Lands Policy Is Consistent With The Tribal Provisions Of the 1987 Amendments To The Federal Clean Water Act ---- 15

V. Sound Principles Of Administrative Law Support EPA's Indian Lands Policy ----------- 18

VI. The IAWG's Position Fails To Recognize Indian Tribes As Equal Partners In Implementing EPA's Indian Lands Policy -------------------- 20

VII. Conclusion ---------------------------------- 22

I. INTRODUCTION

The question presented in the document prepared by Attorney General Ken Eikenberry as Chairman of the National Association of Attorneys General (NAAG) Indian Affairs Working Group Environmental Enforcement Subcommittee (IAWG) challenging EPA's Indian Lands Policy is not whether activities on Indian lands affecting the Reservation environment will be regulated but who should be allowed to regulate those activities; Indian tribes themselves in cooperation with the federal government or the state government. The cover letter submitted to EPA Administrator Thomas and the parade of horribles listed in the first six pages of the document reflect IAWG's bias regarding the role it anticipates Indian tribes should or are capable of playing with regard to the reservation environment. In its cover letter the IAWG curiously excluded Indian tribes in asking that the document be used "as a means of commencing meaningful dialogue between the EPA, the States, as well as the Department of Justice."

While this response is written from the perspective of the Confederated Tribes of the Colville Reservation (Confederated Tribes) and cannot be considered a statement on behalf of Indian tribes generally, characteristics among Indian reservations in Washington State, and throughout the country are common to most. Those common elements are far more significant in fashioning an appropriate federal natural resource protection program for Indian reservations and, therefore, this paper can be considered to reflect tribal experiences, goals and perspectives regarding the correctness of EPA's Indian Lands Policy.

Because tribes have been particularly dependent on natural resources for a livelihood, and because of their strong cultural and religious ties to the natural environment, Indian reservations were commonly and intentionally established by the federal government in areas that would provide tribes with ready access to fish, wildlife, water and other natural resources. [1] These valuable resources may be adversely impacted by development activities and tribes, therefore, have a strong interest in how environmental programs are implemented on their reservations.

In addition to their established exclusive hunting and fishing rights the courts have also recognized Indian tribes' implied rights to environmental protection of the fish and wildlife habitat. **United States v. Washington**, 384 F.Supp. 312, 332 and n. 12 (W.D. Wa. 1974), substantially affirmed and remanded on other grounds, sub nom **Washington v. Passenger Fishing Vessel Ass'n.**, 443 U.S. 658, 683-684, 687 (1979). See also, **United States v. State of Washington**, 694 F.2d 188, 190 (9th Cir.) (Canby, J. concurring), cert. denied, 103 S. Ct. 3536 (1983); **United States v. Adair**, 723 F.2d 1394, 1408 (9th Cir. 1983) cert. denied 104 S.Ct., 3536 (1984). With regard to Indian tribes' reserved water rights the courts have also recognized an implied right to not only a specific amount but to water of a specific quality as well **Pyramid Lake Paiute Tribe v. Morton**, 354 F.Supp. 252 (D.D.C. 1973). Many reservations have significant timber resources, in which tribes also have reserved property interests. **United States v. Shoshone Tribe**, 304 U.S. 111, 116-117 (1938).

Indian tribes retain valuable property interests in natural resources, such as submerged lands which were set aside by the federal government for the benefit of tribes, in order to protect the tribes' ability to preserve those resources for continued beneficial use by their members. **Muckleshoot Indian Tribe v. TransCanada Enterprises, Ltd.** 713 F.2d 455 (9th Cir.

---

[1] The federal government, unlike the state, has undertaken obligations to protect special cultural and religious ties of Indian people to the natural environment. See, e.g., American Indian Religious Freedom Act, 41 U.S.C. §1996; Federal Land Policy and Management Act, 43 U.S.C. §1712(b).

1983) cert denied 466 U.S. 954 (1984); Port of Tacoma v. Puyallup Indian Tribe, 717 F.2d 1251 (9th Cir. 1983) cert denied 466 U.S. 954 (1984). Throughout the country, the establishment of Indian reservations has been found to preserve tribal rights in fish, wildlife and water, as well as other natural resources. See, e.g., Winters v. United States, 207 U.S. 5664 (1908); Arizona v. California 373 U.S. 546 (1963); Menominee Tribe v. United States, 391 U.S. 404, 405-406 (1968).

EPA's Indian policy reflects EPA's recognition of the unique legal status of Indian reservations and tribes, federal Indian policies, and the special rules of statutory construction applicable to laws affecting Indian people. The EPA regulations which require states to demonstrate clear Congressional authorization for state program implementation on Indian reservations reflect a consistent EPA determination that the various federal environmental statutes were not intended to enlarge the scope of state jurisdiction on Indian reservations. See, Bryan v. Itasca County, 426 U.S. 373, 390 (1976). Those regulations further reflect a federal agency determination that EPA needs to retain flexibility to develop national policies regarding resource protection on Indian reservations. Without such flexibility, EPA may find it impossible to provide unitary management systems within reservation boundaries, adequately account for reserved tribal rights, protect tribal self-government, and carry out its federal trust responsibilities. See, Nance v. EPA, 645 F.2d 701, 713-714 (9th Cir. 1981) 454 U.S. 1081 (1981).

EPA's policy is consistent with Congressional intent as expressed in the recent amendments to the Clean Water Act, Safe Drinking Water Act and Comprehensive Environmental Response, Compensation and Liability Act authorizing the Administrator to treat Indian tribes as states. See. Water Quality Act Amendments of 1987, P.L. 100-4 506, February 4, 1987, 33 U.S.C. §1377; Superfund Amendments and Reauthorization Act of 1986, P.L. 99-73 §207, October 17, 1986, 42 U.S.C. §9626; Safe

Drinking Water Act Amendments of 1986, P.L. 99-339 §302, June 19, 1986, 42 U.S.C. §300j-11. It is also consistent with the recent reaffirmation by President Reagan of the federal government's commitment to protecting tribal self-government. See, Indian Policy Statement, 19 Weekly Comp. Pres. Doc., January 24, 1983. In his Policy Statement, President Reagan directed all federal agencies to deal with Indian tribes on a government-to-government basis and administer federal programs consistent with the unique federal/tribal relationship. The President stated:

> ... throughout our history, despite periods of conflict and shifting national policies of Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold.
>
> ***
>
> ... our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

II. EPA's POLICY IS BASED UPON SOUND PRINCIPLES OF INDIAN LAW

Indian tribal territory has always been considered unique and has held a separate status under federal law. Tribes exercise substantial governing powers within their territory, Williams v. Lee, 358, U.S. 217 (1959), including the power to regulate non-members conduct and ultimately exclude them from the reservation for violations of tribal law. Hardin v. White Mountain Apache Tribe, 761 F.2d 1285 (9th Cir. 1985).

In United States v. Wheeler, 435 U.S. 313, 322 (1978), the United States Supreme Court described the powers of Indian tribes as ". . . inherent powers of a limited sovereignty which has never been extinguished." F. Cohen, Handbook of Federal Indian Law 122, (1945). EPA's Indian policy recognizes that Indian tribes have sovereign authority to control activities occurring within their territory. As the Solicitor of the Department of Interior wrote in 1934:

> Over tribal lands, the tribes has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all of the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which a person shall be permitted to enter its domain, reside therein and to do business, provided only such determination is consistent with applicable federal laws and does not infringe any vested rights of persons now occupying reservation land under lawful authority.
> "Powers of Indian Tribes", I Opinions of the Solicitor 445, 467; 55 Interior Decisions 14, 50 (1934).

The Solicitor concluded that:

> In its capacity as a sovereign, and in the exercise of self-government, [a tribe] may exercise power similar to those exercised by any state or nation in regulating the use or disposition of private property, save insofar as it is restricted by specific statutes of Congress.

Id. at 55.

The Supreme Court has consistently reaffirmed the Solicitor's Opinion. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980), " . . Indian Tribes retain attributes of sovereignty over both their members and their territories."

IAWG asserts that increased land ownership by non-Indians and the corresponding increase of non-Indian population on reservation lands caused by the Allotment Era [2] argues against E.P.A. policy and necessitates state regulatory jurisdiction over Indian lands. IAWG misses the point by citing comparisons of Indian and non-Indian population on reservations throughout the United States. Tribal authority and the state's general lack thereof is not based upon the Indian/non-Indian status of reservation residents but the fact that the land comprises an Indian reservation that has unique political and historical basis.

Land within the exterior boundaries of a reservation held in fee by a non-Indian is still considered part of the reservation. Seymour v. Superintendent, 368 U.S. 351 (1962). See, also, Confederated Salish and Kootenai Tribes v. Moe, 425 U.S. 463, 478-479 (1976); United States v. Mazurie, 419 U.S. 544, 553-556 (1974). All lands within an Indian reservation, including fee patented lands, are part of "Indian country." 18 U.S.C. § 1151. Decoteau v. District Court, 420 U.S. 425, 427 n.1 (1975). See, also, Washington v. E.P.A., 752, F. 2d 1465, 1467, n.1 (9th Cir. 1985). "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." Solem v. Bartlett, 465 U.S. 463, 470 (1984) citing United States v. Celestine, 215 U.S. 278, 285 (1909).

E.P.A.'s policy recognizes the general sovereign authority of Indian tribes over Indian lands and the complete lack of state regulatory authority over those reservation lands held in trust or restricted fee status. **Sequndo v. City of Rancho Mirage**, 813 F. 2d 1387 (9th Cir. 1987); Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655 (9th Cir. 1975), cert. denied 429 U.S. 1038; Accord, **United States v. Humboldt**, 615 F. 2d 1260 (9th Cir. 1980); **Snohomish County v. Seattle Disposal Co.**, 70 Wn. 2d 668 (1967); cert. denied, 389 U.S. 1016 (1967); 25 C.F.R. § 1.4.

---

[2] The General Allotment Act of 1887, 24 Stat. 388, 25 U.S. §331 et. seq. IAWG is less than candid in saying that the allotment policy was "ultimately modified." "The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. §461 et. seq." Mattz v. Arnett, 412 U.S. 481, 496, n. 18 (1973)(emphasis added).

E.P.A.'s approach to look to Indian tribes as the sole authority to implement environmental programs on reservation lands avoids the impractical pattern of checkerboard jurisdiction which is contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See, **United States v. Mazurie**, 419 U.S. 544, 554-555 (1975). With its Indian Lands Policy, E.P.A. is merely following Congress' intent which was recently acknowledged by the United States Supreme Court. "Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." **Moe v. Salish and Kootenai Tribes**, 425 U.S. 463, 479 (1976).

Recent expressions of the Supreme Court also support E.P.A.'s Indian policy. In **Iowa Mutual Insurance** Co. v. LaPlante, 480 U.S. _______ 107 S.Ct. 971 (1987), the Supreme Court discussed the extent of a tribe's jurisdiction.

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. (citations omitted). Civil jurisdiction over such activities presumptively lies in the tribal court unless affirmatively limited by specific treaty provision or federal statute. Id. at 978.

The Supreme Court's view in **LaPlante** is consistent with the longstanding federal policy of fostering tribal self-government. See, e.g., **Three Affiliated Tribes** v. Wold Engineering, 476 U.S. _________, 106 S. Ct. 2305 (1986); Merrion v. Jicarilla Apache Tribes, 455 U.S. 130, 138, n.5; White Mountain

Apache Tribe v. **Bracker**, 448 U.S. 136, 143-144 n.10; **Williams** v. **Lee**, 358 U.S. 217, 220-221 (1959).[3]

In contesting EPA's determination that absent express language from Congress granting jurisdiction over Indian lands states lack regulatory authority over Indian lands, IAWG cites **Rice v. Rehner**, 463 U.S. 713 (1983), and **California v. Cabazon Band of Mission Indians**, 480 U.S. ___, 94 L.Ed. 2d 244 (1987) for the proposition that state law applies to reservation fee lands unless specifically preempted by federal law or the state law interferes with tribal self-government. Neither case can be read so broadly. In fact **Cabazon** rejected the reasoning in **Rehner** and limited that case specifically to the fact that regulating liquor traffic was involved; an area that "Congress, historically, had plainly anticipated that the states would exercise concurrent authority. . . on Indian reservation. **Cabazon** 94 L.Ed 2d at 262.

The IAWG seems to embrace Justice Stevens' presumption that state laws apply to Indian lands absent an express Congressional statement to the contrary. As the majority opinion indicates, however, "in the context of an assertion of state authority over the activities of non-Indians within a reservation, [t]hat is simply not the law.'" **Cabazon**, 94 L.Ed.2d at 259 n. 18.

Indian tribes are dependent on the federal government, not the states, for political, as well as practical, reasons. **Washington** v. **Colville Confederated Tribes**, 447 U.S. 134, 154 (1980). Because "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history," Rice v. Olsen, 324 U.S. 786, 789 (1945), extensions of state sovereignty over Indians and Indian reservations in matters that affect the welfare of the reservation Indian community are found only when Congress expressly, unequivocally and clearly intends that result. **McClanahan v. Arizona Tax Commission**, 411 U.S. 164, 170-171 (1973). And the "eminently sound and vital cannon," **Northern Cheyanne Tribe v. Hollowbrest**, 425 U.S. 649, 655 n. 7 (1976), that ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians "has special force in the face of claims that ambiguous statutes abolished by implication Indian immunities." **Bryan v. Itasca County**, 426 U.S. 373, 392 (1976).

---

[3] Numerous federal statutes designed to promote self-government embody this policy. See, e.g., 25 U.S.C. § 450, 45a (Indian Self-Determination and Assistance Act); 25 U.S.C. § 476-479 (Indian Reorganization Act); 25 U.S.C. § 1301-1341 (Indian Civil Rights Act).

It should also be remembered that Congress usually does not authorize extensions of state jurisdiction in Indian country without "comprehensive and detailed congressional scrutiny." **Kennerly v. District Court**, 440 U.S. 423, 427 (1971). This is especially true for legislation enacted since 1968, which has been a period during which Congress has rejected assimilationist and termination policies in favor of those promoting tribal self-government. **Bryan v. Itasca County**, 426 U.S. at 388-389 n. 14, quoting **Santa Rosa Band of Indians v. Kings County**, 532 F.2d at 663. *See*, Canby, *American Indian Law*, 28-31 (1981). And, where, as in the case of environmental regulation of Indian land, there is a recognized immunity from state regulation, the courts ". . . are reluctant to infer that Congress has authorized the assertion of state authority in that respect 'except where Congress has expressly provided that state law shall apply.'" **Rice v. Rehner**, 463 U.S. at 720 (citation omitted). Recent expressions of Congress clearly indicate otherwise. EPA's Indian Lands Policy reflects Congress' intent, the President's Indian Policy and is consistent with established case precedent. Any attempt to modify the policy based upon some misappropriate case by case balancing test is unwarranted and contrary to the law.

III. THE CURRENT SITUATION ON INDIAN LANDS IS NOT AS BLEAK AS THE IAWG PORTRAYS

Mr. Eikenberry uses a number of examples allegedly occurring on reservations throughout the county to support the need for state regulatory authority. He was less than forthright, however, in presenting those examples. The paper cites an article in the Los Angeles Times which in part discussed industry's attempt to woo Indian tribes to allow reservations to become dumping grounds for hazardous waste. The reference to the article implies that without state regulatory control, Indian tribes, in conjunction with EPA, BIA and IHS exercising their trust responsibility, are either incapable or unwilling to adequately protect the reservation environment. This is simply not true. The IAWG's sensationalist approach is disingenuous.

Section 104(k) of the Superfund Amendments and Reauthorization Act (SARA) of 1986, requires that by 1989 each state certify it has sufficient treatment, storage or disposal capacity adequate to handle the disposal of hazardous waste generated within that state over the next 20 years. Many large firms are, therefore, wooing many governments to establish hazardous waste facilities. In the State of Washington ECOS, headed by William Ruckleshouse, is canvassing the state for potential hazardous waste sites and promising big bucks to counties and local economies. With Washington Department of Ecology's endorsement, Rabanco is developing a hazardous waste facility in Grant County within a quarter mile of the Columbia River in violation of WDOE's recently adopted hazardous waste facility siting standards. The city of Spokane is in the final developmental stages of a waste-energy incinerator to handle its solid waste.

The IAWG seems to be particularly concerned about the Colorado River Indian Tribes (CRIT) landfill in Parker, Arizona. It is important to recognize that Arizona has adopted the minimum federal RCRA standards. These are the same standards that apply to Indian lands as a result of EPA's retention of RCRA authority over such lands. See, Washington v. EPA, 752 F.2d 1465 (9th Cir., 1985). As such, whether the landfill is located on an Indian reservation, or off reservation somewhere in Arizona, does not determine whether it could accept waste generated in California that because of California's strict statutory scheme cannot be disposed in California.

The IAWG only relies on portions of the L.A. Times article and fails to acknowledge that the article also indicated a moratorium had been placed on the landfill operations by CRIT, or that CRIT had a strict monitoring program in place. A check with EPA Region 9 would also have revealed that EPA has been involved in monitoring and testing the site and has approved an IHS funded tribal sampling program.

What is the point of all of these examples? Simply to show that Indian tribes and the federal government can regulate activities on Indian lands and have the desire to protect the reservation environment and are doing it. It is important to note the Gila River Indian Community rejected Waste Management's 10 million dollar per year offer that was also referenced in the article. Query whether local or state government could avoid such a temptation?

The worst example of lack of candor and honesty by the author of the IAWG's position is the quote from the Seattle Daily Journal of Commerce regarding an advertisement to place businesses on the Swinomish Reservation which is found at page 4, footnote 6. The reference leads one to believe that the article is recent and that the Swinomish are somehow marketing an exemption to state regulations. The author conveniently fails to indicate that the advertisement quoted was from a June 1977 edition of the paper, prior to SARA, CERCLA and other federal regulatory standards and programs that have since been established and are applicable to Indian lands. See e.g. Phillips Petroleum Co. v. EPA, 803 F.2d 545, 555, 556 n. 14 (9th Cir. 1986). Even if the Swinomish wish to market some kind of exemption, which they assuredly do not, federal minimal standards still apply and are being enforced.

> The absence of state enforcement power over reservation Indians, however, does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations. Those standards are designed to protect human health and the environment. (citation omitted). The state and its citizens will not be without protection. **Washington v. EPA**, 752 F.2d at 1472.

At pages 4 and 5 of the document, the IAWG indicates that states are concerned that if they are unable to apply state laws to activities on Indian lands those activities will not be adequately regulated. The paper then goes on to cite a series of examples. Once again the author exposes his total lack of knowledge of the current state of the law. As his first example, the author asserts that if state water quality standards do not apply to waters on Indian lands, "there is no applicable standard because EPA has not promulgated federal water quality standards". The fact that a federal standard does not apply does not mean that there is no law. Tribal water quality standards adopted pursuant to tribal law would apply to all reservation waters. See, e.g. Colville Water Quality Standards Act, CTC 33.01.010-140. Furthermore, the issue is mooted by the 1987 Amendments to the Clean Water Act because Indian tribes will now be eligible for treatment as states for purposes of Section 303, 33 U.S.C. §1313, which outlines the statutory procedure for a state to submit its standards for approval to the EPA. Finally, EPA could choose to operate its NPDES permitting program on Indian lands in the same manner as it does for federal facilities by adopting the state water quality standards by reference. See, EPA v. State Water Resources Control Board, 426 U.S. 200 (1976). Tribal water quality standards can also be enforced as tribal law against Indian and non-Indian alike. See, Iowa Mutual Insurance Company v. LaPlante, 480 U.S. ____, 107 S.Ct., 971 (1987); Montana v.

United States, 450 U.S. 544, 565-566 (1981); **Accord New Mexico v. Mescalero Apache Tribe**, 461 U.S. 324, 331 n. 12 (1983).

The IAWG's second example is that many states have adopted environmental controls that are more stringent than the national controls. Since federal laws are the statutory minimum standards, Indian tribes also are able to adopt stricter environmental controls as a component of tribal law. Nothing within the federal statutory scheme expresses an intent by Congress to interfere with the Tribes' sovereign authority to pass its own laws and be ruled by them.

The third example of the IAWG is that many states have enacted environmental laws which cover subject areas not covered by Congressional enactments. EPA's Indian Lands Policy would not be implicated in those areas where there is not in existence an umbrella environmental statute. Indian tribes have also enacted environmental regulatory programs covering the same subject areas cited by the IAWG [4].

The fact that Congressional enactments do not comprehensively regulate all subject areas does not by implication leave them to the state. The fact that some tribes may find it more appropriate to work cooperatively with a particular state or invite that state to regulate certain environmental media on a particular reservation, see, e.g. **Thompsen v. King County**, 39 Wn. App. 505, review denied, 103 Wn. 2d 1030 (1985), does not require abolition of EPA's Indian Land Policy. Rather than devoting so much energy to subverting Indian tribes' recognized sovereign authority over its land by lobbying EPA to abandon its policy, states would be better advised to recognize that policy and work cooperatively with Indian tribes on a government-to-government basis to insure adequate protection of the environment consistent with their respective governmental interests.

---

[4] Colville Water Quality Management Plan - non-point source pollution control; Salish and Kootenai Shoreline Management Plan - shoreline management.

IAWG's final illustration of the reasons state environmental laws must apply on Indian lands is that Indian tribes lack criminal jurisdiction over non-Indians within reservations. This is another red herring and again, misses the point. EPA's proposed regulations exclude exercise of criminal jurisdiction over non-Indians as a requirement to program primacy. Congress specifically excluded the requirement when it recently adopted the Indian amendments. Each of the federal laws implicated by EPA's Indian Lands Policy has provisions for federal criminal enforcement. See, e.g., FWPCA, 33 U.S. §1319(c); CERCLA, 42 U.S.C. §9603; RCRA 42 U.S.C. §6928. [5]

IV. EPA'S INDIAN LANDS POLICY IS CONSISTENT WITH THE TRIBAL PROVISIONS OF THE 1987 AMENDMENTS TO THE FEDERAL CLEAN WATER ACT.

The IAWG implies that EPA's Indian Policy is improperly impacting the Indian amendments to the Clean Water Act. The Confederated Tribes have spent substantial amount of time and money commenting on the various proposed rulemaking to implement those amendments and would refer the reader to those comments. [6]

---

[5] The criminal prosecution of Daniel Turner for illegally dumping pesticides on his fee property located on the Colville Indian Reservation is illustrative of EPA's criminal authority and tribal federal cooperation envisioned by Congress. U.S.A v. **Daniel Lee Turner**, Case No. CR-86-322-1(EDWA 1987). Although Mr. Turner was acquitted by the jury, criminal prosecution is available on Indian lands and EPA and the Department of Justice have shown a willingness to exercise that criminal jurisdiction in cooperation with Indian tribes.

[6] June 24, 1987 Comments to EPA's proposed UIC Program for Indian Lands; September 25, 1987 comments to EPA's "Proposed Indian Primacy Regulations implementing UIC and PWS programs under SDWA; January 22, 1988 Comments on Proposed Regulations implementing SSAD and WHP Programs under SDWA; February 17, 1988 Comments on EPA's Draft Report to Congress on Indian Wastewater Treatment Needs and Assistance; January 11, 1988 Comments on

While the Confederated Tribes is concerned with some of EPA's proposals and interpretation of the amendatory language, it fully supports the basic approach of the EPA that state regulatory authority is inapplicable to Indian lands and jurisdiction remains with the Indian tribe and EPA under the relevant federal statutes.

The IAWG greatly misconstrues Congressional intent and established case precedent when it asserts that with regard to their own reservation lands, Indian tribes should be required to demonstrate their legal authority over them in the EPA authorization process. Paper at 21. An analysis of the three criteria Congress imposed on the Administrator before he may treat an Indian tribe as a state points out the absurdity of the IAWG's position. The three criteria are set forth in sub-section e of section 518 of the 1987 Amendments. The word jurisdiction is not used in any of the enumerated criteria.

The first criteria requires the Indian tribe to have a "governing body carrying out a substantial governmental duties and powers." The phrase is a term of art used by Congress. It first arose in the context of the Indian Tribal Governmental Tax Status Act of 1982, P.L. 97-473, 96 Stat 2605, 2607-11, and has been imported to the environmental statutes. An Indian tribe simply needs to show that it has a functioning government and governmental institutions. Nothing in subsection one indicates that the Indian tribe has to have a governing body carrying out duties and powers over a particular area or particular entity or particular person. It needs to simply show that it is exercising governmental duties and powers. Most, if not all, federally recognized tribes exercise governmental duties and power. It is not surprising then that EPA in its rulemaking has indicated that qualifying for treatment as a state for purposes of the water quality standards should not be difficult for most tribes. See,

---

EPA's Draft Water Quality Standards Regulations for Indian lands; February 29, 1988 comments on EPA's Proposed Regulations and Guidance on CWA Grants to Indian Tribes.

David K. Sabock letter, January 19, 1988 discussing draft revisions to 40 CFR Pt. 121 at 10-11.

Congress made it very clear as to what it meant regarding the reach of a tribe's authority under the Clean Water Act when it established the requirements of criteria two. The functions to be exercised by the Indian tribes need merely to pertain to "the management and protection of water resources held by the Indian tribe, a member of the tribe if the land is in trust or restricted fee status, or otherwise within the borders of an Indian reservation." A tribe's treatment as a state under the Clean Water Act is not based upon some esoteric balancing of comparative interest. Congress has already done the balancing. If the water resources are within the exterior boundaries of the reservation and the tribe has a government and in the Administrator's opinion is capable of administering the Clean Water Act program, the tribe is to be treated as a state.

The conclusion that Congress intended the extent of the tribe's regulatory authority over all reservation waters is bolstered by the fact that it authorized the Administrator to develop a mechanism "to resolve potential unreasonable consequences that may arise on common water bodies because of differing standards." Congress never mentioned anything about concurrent jurisdiction because it was recognized as impractical in light of Congress and the Court's desire to eschew checkerboard jurisdiction and because Congress recognized that, after all, it is the Indian tribe's resource.

The final criteria recognizes that many tribes may lack the infrastructure to adequately manage and administer a complex environmental regulatory program. This is due in part to the fact that Indian tribes have largely been ignored as Clean Water Act Programs were developed over the last fifteen years. While untold billions were provided to states, precious little of that money trickled down to Indian tribes. See Draft Report to Congress on Indian Wastewater Treatment Needs and Assistance, January 7, 1988, p.4. Nothing in the requirement that a tribe show it is administratively capable to carry out the functions of the program consistent with the requirements of the Act can be construed to show that Congress concluded Indian tribes lack authority over its lands. See, **Colville Confederated Tribes v. Walton**, 647 F.2d. 42 (9th Cir., 1981) (tribe has exclusive jurisdiction to issue water permits for water that arises and falls within reservation and state lacks authority).

EPA not only is properly implementing its Indian policy but following the statutory mandate of the Clean Water Act itself in developing the regulations and procedures the Administrator will use in determining whether to designate a particular Indian tribe as a state for purposes of Clean Water Act Programs. Once again, it is the IAWG that misconstrues the law and is impeding the implementation of the Indian amendments.

V. SOUND PRINCIPLES OF ADMINISTRATIVE LAW SUPPORT EPA'S INDIAN LAND POLICY

Shortly after Congress enacted the various environmental statutes of the 1970's, an EPA attorney prepared one of the earliest analyses of the effect of those statutes on state jurisdiction within Indian reservations. He concluded that Congress did not intend to substitute state for federal authority. That analysis was published, and is reflected in EPA's 1983 Indian Land Study and the subsequent Indian Policy of 1984. See, J.Kemper Will, "Indian Lands Environment--who should protect it?", Nat. Resource Journal 465 (July 1978). See also, EPA General Counsel Opinions, nos. 77-6, 76-28a. EPA regulations regarding the approval of state implementation programs on Indian reservations have consistently required a state to show express Congressional authorization of its asserted authority.
Congress's more recent expressions authorizing the Administrator to treat Indian tribes as a state underscore the correctness of those early positions.

These consistent agency interpretations of various federal environmental statutes should be followed unless there are compelling indications they are wrong. *See*, Fidelity Federal Savings and Loan Association v. delaCuesta, 458 U.S. 141, 152-154 (1982); NLRB v. Hendricks County Rural Corporation, 454 U.S. 170, 177 (1981); Nance v. EPA, 645 F.2d. 701 (9th Cir., 1981) *cert. denied* 454 U.S. 1081 (1981).

In Nance v. EPA, supra, the court determined that EPA had the discretion to treat Indian reservations differently from other areas, and to provide exclusive federal/tribal control of air quality standards, even before the 1977 amendments in which Congress expressly authorized tribal air quality designations. The court held that EPA did not exceed its statutory authority nor abuse its discretion, when it decided to delegate authority to tribes to designate air quality standards on an Indian reservation, 645 F.2d at 713-714, notwithstanding the fact that the Clean Air Act specifically provided that each state "shall have the primary responsibility for assuring air quality *within the entire geographic area* comprising such state by submitting an implementation plan. . . ." 42 U.S.C. §7407(a) (emphasis added). The court held.

> . . . we cannot find compelling indications that the EPA's interpretation under the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decision making.

Id. at 714.

EPA's implementation of environmental statutes with regard to Indian lands has also been more recently presented to the courts. In upholding the EPA's determination that the Resource Conservation and Recovery Act (RCRA) did not grant state jurisdiction over Indian lands, the Court held that when a statute is silent or unclear with respect to a particular issue it must defer to the reasonable interpretation of the agency responsible for administering the statute. **Washington v. EPA**, 752 F.2d at 1469. In such a case, a reviewing court may not substitute its judgment for that of the agency as long as the agency has adopted a reasonable construction of the statute. **Chevron, USA, Inc. v. Natural Resources Defense Counsel**, 467 U.S. 837 (1984). "The agency's interpretation is especially weighty where statutory construction involves reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation (depends) upon more than ordinary knowledge respecting the matter subject to agency regulations." 752 F.2d at 1469 (citations omitted).

The Tenth Circuit in **Phillips Petroleum Company v. EPA**, 803 F.2d 545 (10 Cir., 1986), upheld the EPA's establishment of an underground injection control program under the Safe Drinking Water Act for the Osage Indian Reserve. The court specifically addressed the question of whether EPA was empowered to promulgate special regulations for Indian lands. [7] In supporting EPA's authority the court found that Congress intended to include Indian lands in SDWA's application. **Phillips v. EPA**, supra at 555, 556. The court also noted that the issue raised by Phillips Petroleum's challenge in the case "cannot recur, and will in the future, be no more than a historical curiosity, probably confined to this case, [because] [t]he 1986 amendments to the SDWA resolved any doubt concerning coverage of the SDWA by expressly including Indian tribes." Id. at 552. In light of the amendments to CERCLA and the FWPCA allowing Indian tribes to be treated as states, a court challenge to the EPA's policy would also dictate the same result. It is therefore, unclear why the IAWG continues to adhere to its assertions of state regulatory jurisdiction under those two statutory schemes. EPA's position is unassailable and based upon the cases cited above would withstand judicial scrutiny in the event it is challenged. Perhaps that is why Mr. Eikenberry and the IAWG is lobbying Administrator Thomas directly to implement a change.

---

[7] In that case, all parties agreed that Oklahoma State Government has no power to prescribe an underground injection control program regulating the Osage Indian Reserve. Phillips at 554.

VI. THE IAWG'S POSITION FAILS TO RECOGNIZE INDIAN TRIBES AS EQUAL PARTNERS IN IMPLEMENTING EPA's INDIAN LANDS POLICY

Mr. Eikenberry places great weight on the fact that Washington has always regulated activities on Indian lands and continues to do so in spite of EPA's Indian policy. Such a position is not surprising given the history of the Washington Attorney's General office regarding Indian issues. Whether one studies the history of the U.S. v. Washington battle regarding fish, Colville Confederated Tribes v. Walton, regarding regulation of reservation water rights, WDOE v. EPA, regarding EPA's retention of federal jurisdiction over Indian lands under RCRA or more recent developments such as the letter to Ed Meese or this letter on National Attorney General's Association letterhead to Administrator Thomas demanding a change in the Indian policy, the message is always the same. Washington refuses to recognize Indian tribes as unique political entities exercising sovereign authority over their lands with whom the state should work cooperatively on a government-to-government relationship.

The Court in Puget Sound Gillnetters Association v. U.S. District Court, 573 F.2d 1123 (9th Cir., 1978) underscored the hostility (spearheaded by the Attorney General's Office) the State of Washington has shown toward Indian tribes and its possible racial overtones. In addressing the State's refusal to recognize and implement Indian treaty fishing rights even after those rights had been repeatedly upheld by the federal courts, The Court of Appeals said:

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state fishery in order

> to enforce its decrees. Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

Id at 1136.[8]

The reference to the desegregation cases by the court was by no means accidental. Is it of any surprise then that Mr. Eikenberry proudly asserts that Washington continues to issue permits and regulate activities under state law in spite of EPA's regulations?[9]

VII. CONCLUSION

EPA's Indian Lands Policy was correct when it was initially adopted. It continues to reflect President Reagan's Indian Policy, established case law and the express intent of Congress and, therefore, should not be abandoned. It is unfortunate that certain states (or at least certain agencies within those states) persist in their attempt to undermine the political sovereignty and regulatory authority of Indian tribes over their lands.

---

[8] Accord Washington v. Passenger Fishing Association, 443 U.S. 658, 696 and n. 36 (1979). Washington has continually interfered with federal and tribal attempts to regulate the reservation's environment. See, Lummi Tribe v. Hallauer, 9 Indian Law Reporter 3025 (W.D. WA. 1982); Cardin v. DelaCruz, 671 F.2d 363 (9th Cir., 1982), cert denied, 459 U.S. 967(1982) Washington v. EPA, 752 F.2d 1465 (9th Cir. 1985). Other states have not been so cavalier in their relationships with Indian Tribes. See, e.g., Oregon Attorney General's Opinion No. 8138, Feb. 10, 1983, authored by David Frohmayer, current president of the NAAG; Wisconsin Governor Anthony S. Earl's Executive Order No. 31, dated October 13, 1983.

[9] EPA's Indian policy continues to be in the early stages of development. Final regulations regarding how a particular Indian tribe may qualify as a state are not due until August, 1988. While many tribes are currently operating environmental programs within their borders, they have yet to receive state-like status contemplated in the Indian amendments.

Attorney General Eikenberry's less than candid presentation challenging EPA's Indian policy has forced Indian tribes to devote already scarce resources that could have been used more constructively elsewhere to prepare a response. The citizens of the State of Washington and the reservation environment would be better served if the Attorney General would recognize tribal sovereignty and direct his efforts to working directly with Indian tribes on a government-to-government basis to implement EPA's Indian Land Policy.

Respectfully submitted,

Bruce Didesch

Bruce Didesch
Reservation Attorney

RICHARD A. DU BEY
ATTORNEY AT LAW

SUITE 3110
BANK OF CALIFORNIA CENTER
SEATTLE, WASHINGTON 98164

AREA CODE 206
621-7034

June 21, 1988

Honorable Lee M. Thomas
Administrator
Environmental Protection Agency
401 M. Street S.W.
Washington D.C. 20460

RE: Revised Legal Analysis in Support of the EPA Indian Lands Policy

Dear Mr. Thomas:

Attached to this letter is the final Legal Analysis in support of the EPA Indian Lands Policy and Tribal Authority to Regulate the Reservation Environment. The document previously distributed had not undergone final editing. Please disregard the June 6, 1988 draft analysis and substitute the enclosed final in its place.

For your information I have also enclosed a second letter from Attorney General Eikenberry letter wherein he clarifies his position regarding state/tribal relations. In this letter of June 3rd, Attorney General Eikenberry recognizes tribal sovereignty, the role of cooperative agreements in resolving state/tribal jurisdictional disputes, and acknowledges the importance of tribal environmental protection programs.

The Attorney General's "clarifying letter" is a step in the right direction. However, current federal policy emphasizing the twin themes of tribal self-determination and economic self-sufficiency goes further than simply recognizing tribal sovereignty. Federal policy demands that states work with tribes to realize the goals set by tribal governments. Self-determination mandates that the programs and policies set by tribal government drive the development of regulatory measures to protect the health of the reservation population and the quality of the reservation environment. The Tribes will work with the

State on a government-to-government basis to accomplish this objective.

Sincerely,

THE Du BEY LAW FIRM

RA DuBey

RICHARD A. Du BEY
Special Environmental Counsel to the Colville Confederated Tribes, the Swinomish Indian Community and the Puyallup Tribe of Indians

RAD:lb
Enclosures
cc: Mel Tonasket, Chairman, Business Council
Colville Confederated Tribes
Robert Joe, Sr., Chairman, Swinomish Indian Senate
Swinomish Indian Community
Bill Sterud, Chairman, Tribal Council
Puyallup Tribe of Indians

LEGAL ANALYSIS IN SUPPORT OF THE EPA INDIAN LANDS POLICY AND TRIBAL AUTHORITY TO REGULATE THE RESERVATION ENVIRONMENT

Submitted to

the Administrator

of the

U.S. Environmental Protection Agency

by

The Colville Confederated Tribes

The Swinomish Indian Community

and

The Puyallup Tribe of Indians

June 10, 1988

The Du Bey Law Firm
Seattle, Washington

TABLE OF CONTENTS

Page

I. FEDERAL AND TRIBAL ENVIRONMENTAL REGULATORY JURISDICTION OVER THE RESERVATION ENVIRONMENT 1

  A. Background 1
  B. Federal Indian Policy 1
  C. States are Without Jurisdiction to Regulate the Reservation Environment . . . 2

    1. WDOE v. EPA 2
    2. Land Use Control 5

  D. Puyallup and Swinomish Regulation of the Reservation Environment 10

II. FEDERAL POLICY SUPPORTS TRIBAL SOVEREIGNTY OVER THE RESERVATION ENVIRONMENT 11

  A. The Executive Branch 12
  B. The Judicial Branch 13
  C. The Legislative Branch 14
  D. State Action Supporting Federal and Tribal Authority 16

III. FEDERAL AND TRIBAL REGULATORY SCHEMES ARE APPLICABLE TO INDIAN LANDS 17

IV. JURISDICTION 19

  A. Introduction 19
  B. Tribal Sovereignty 21
  C. Property Ownership and Control 24
  D. Federal Preemption and the Court's Balancing Test 28

V. FEDERAL TRUST RESPONSIBILITY 32

VI. CONCLUSION 33

LEGAL ANALYSIS

I. FEDERAL AND TRIBAL ENVIRONMENTAL REGULATORY JURISDICTION OVER THE RESERVATION ENVIRONMENT

A. Background

Native American Indian cultures have always had a close and unique relationship with the physical and natural environment. The lands, waters and living things which comprise the environment of Indian lands are integral components of the social cultural and spiritual life of Indian people. Resource management has traditionally been a responsibility of tribal government.

B. Federal Indian Policy

In 1983, the United States adopted a major Indian policy statement which acknowledged the governmental status of Indian tribes and provided for the establishment of "government-to-government" relationships between the federal government and Indian tribes.[1] In November, 1984, the U.S. Environmental Protection Agency ("EPA") took the important step of publishing Agency policy for the development and implementation of tribal environmental protection programs.[2] It is this latter policy which Washington State Attorney General Eikenberry now challenges.[3]

---

[1] President Reagan, Statement of Indian Policy. 19 Weekly Comp. Pres. Doc. 98 (January 24, 1983).

[2] EPA, Indian Policy Statement (November 4, 1984).

Even before the EPA policy was finalized, two of the western states which are signatories of the Eikenberry letter, Washington and California, attempted to crush the Government's acknowledgement of tribal sovereignty. This challenge took place before the U.S. Court of Appeals for the Ninth Circuit and where the State of Washington and its amicus California requested that the court override an EPA policy decision, in furtherance of the Agency's Indian policy.

EPA policy in that case supported federal, and not state regulatory jurisdiction over hazardous waste management on Indian lands. In State of Washington, Department of Ecology v. EPA, the Ninth Circuit was presented with a case of first impression and asked to define the respective roles of federal, tribal and state governments in the regulation of Indian lands under federal environmental law.[4]

C. States are Without Jurisdiction to Regulate the Reservation Environment

1. WDOE v. EPA

Federal policy, supporting tribal sovereignty in environmental matters, is well supported by legal commentary.[5] Tribal governments are now recognized under federal environmental laws as one of the three sovereigns which comprise this Nation.[6]

---

[3]. Eikenberry, K., "EPA Indian Lands Policy: the Need for Re-evaluation and Revision," submitted on letterhead of the National Assoc. of Attorneys General (March 4, 1988). (Hereinafter referred to as "Eikenberry letter" or "Eikenberry analysis").

[4]. Washington Department of Ecology v. EPA, 752 F.2d 1465 (9th Cir.1985). (hereinafter referred to as "WDOE v. EPA").

---

[5] *See generally*, EPA Office of Federal Activities, *Interim Strategy for Implementation of the EPA Indian Policy*, (November, 1985) (recognizing need to work with tribal bodies on a government-to-government basis); Americans for Indian Opportunity, *Survey of American Indian Environmental Protection Needs on Reservation Lands: 1986*, at 19 (September, 1986) (listing top tribal jurisdictional priority issue as attempted state assertion of jurisdiction over reservation environmental issues); Petros, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government* 48 U.Colo. L. Rev. 63,89,93 (1976) (acknowledging tribal dissatisfaction over state environmental jurisdiction over reservation lands and such jurisdiction violating basic principles of Indian law); Will, *Indian Lands Environment - Who Should Protect It* 18 Nat. Res. Journal 465 (1978) (presenting legal argument for federal and tribal jurisdiction of federal environmental laws of general applicability); and Schnidman, *Indians and the Environment: An Examination of Jurisdictional Issues Relative to Environmental Management*, 4 Col.J. of Env.Law 1 (1977) (noting that states have not fared well in the courts, and have lost authority to apply state environmental policy and programs to Indian domains). *See also* Note, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law* 61 Ore. L. Rev. 561 (198_) (noting risk of states attempting to extend unprecedented control over tribal environmental matters); Note, *Environmental Law - Federal Indian Law - Recent Developments - State of Washington, Department of Ecology v. United States EPA, 752 F.2d 1465 (9th Cir.1985)*, 27 Nat.Resources J. 439 (1987) (acknowledging effective bar to extension of state authority over Indian Country in environmental regulatory areas, especially for recent amended statutes); Note, *Regulatory Jurisdiction over Non-Indian Hazardous Waste in Indian Country*, 72 Iowa L.Rev. 1091 (1987) (concluding that tribal governments are the proper regulatory authority over non-Indian hazardous waste in Indian Country). *But cf.* Allen, *Who Should Control Hazardous Waste on Native American Lands: Looking Beyond Washington Department of Ecology v. EPA*, 14 Ecology L.Q. 69 (1987) (arguing for state jurisdiction over hazardous waste in Indian Country).

[6] *See* recent amendments to the Safe Drinking Water Act; 42 U.S.C. §300f *et seq.*; The Clean Water Act, 33 U.S.C. §1251 *et seq.*; and Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. 9610 *et seq*. These amendments acknowledge the sovereign status of Indian tribes and

Tribal governments thus have the opportunity to exercise their sovereign power to protect the health and welfare of the reservation population and the quality of the reservation environment. This opportunity comes at a time in history when tribal leaders welcome the opportunity to use environmental law to protect traditional tribal values.

Federal courts have consistently supported EPA and Indian tribal efforts to assert federal and tribal environmental regulatory jurisdiction over the reservation environment.[7] Judge Canby, writing for the Ninth Circuit in WDOE v. EPA, recognized that EPA properly denied Washington's request that the agency approve assertion of hazardous waste regulatory jurisdiction over reservation environments.[8] Similar reasoning was applied in Phillips Petroleum Co. v. EPA where the Court of Appeals for the Tenth Circuit affirmed EPA's authority to implement the Underground Injection Control ("UIC") Program on Indian lands even before Congress specifically authorized EPA to do so under the 1986 Amendments to the Safe Drinking Water Act.[9]

The seminal case in the area of Indian environmental law is

---

confirm EPA's ability to treat tribes as states for the purposes of implementing and regulating environmental programs.

[7]. It is also worth noting that as early as 1971 the Department of Interior had recognized and approved an ordinance enacted by the Fort Hall Business Council prohibiting aerial spraying of herbicides within the confines of the Fort Hall Indian Reservation. 78 I.D. 229 (April 19, 1971).

[8]. 752 F.2d 1465, 1467 (9th Cir. 1985).

[9]. 803 F.2d 545 (10th Cir.1986).

Nance v. Environmental Protection Agency.[10] In Nance, the Court of Appeals for the Ninth Circuit supported EPA approval of the Northern Cheyenne Tribe's redesignation of the reservation airshed from Class II to Class I, even though no express authority for such action was provided for in the federal Clean Air Act.[11] Last year, the District Court of South Dakota, in Blue Legs v. U.S. EPA, recognized that tribal adoption of open dumping ordinances under federal solid waste legislation established tribal authority and responsibility for implementing the program.[12]

2. Land Use Control

Similar judicial support for tribal regulation of the reservation environment is found in the Indian zoning cases.[13] It is well established that Indian tribes can regulate members and non-members on fee and trust lands within the reservation through land use, shoreline or zoning codes as long as the tribes are able to demonstrate sufficient tribal interest in land use control.[14]

---

[10] 645 F.2d 701 (9th Cir. 1981), cert. denied, 454 U.S. 1081 (1981).

[11] Id. at 704.

[12] 668 F. Supp. 1329 (D.S.D. 1987).

[13] One must note, however, that courts generally give greater deference to sovereign police power environmental regulation than land use. See California Coastal Com'n v. Granite Rock, ___ U.S. ___, 107 S.Ct. 1419, 1428 (1987) (land use and environmental regulation are distinct activities, and the California Coastal Commission can regulate federally licensed permits on federal land despite the limited authority of the Coastal Zone Management Act, 16 U.S.C. §1451 et seq., and claims of federal preemption).

Protecting community health and welfare through land use controls has long been recognized as a valid exercise of sovereign authority.[15] The Courts have also recognized tribal authority to develop and implement shoreline programs.[16]

Protection of the reservation environment was specifically identified as affecting the economy, welfare, and health of the Flathead Indian Tribe in Confederated Salish and Kootenai Tribes v. Namen, where the Ninth Circuit responded that:

> [T]he use of the bed and banks of the south half of Flathead lake...if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake....Hence the challenged ordinance falls squarely within the exception recognized in Montana.[17]

---

[14] See, eg., Yakima v. Whiteside, 828 F.2d 529 (9th Cir. 1987) (Tribe had authority to zone to the exclusion of county zoning under balancing test); Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900, 903 (10th Cir. 1982) (holding that the power to control non-Indian land within the reservation stemmed from sovereign rights of self-government and territorial management); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), cert. denied, 459 U.S. 967 (1982) (Tribe was able to enforce health regulations on non-Indian within reservation); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, 459 U.S. 977 (1982) (Tribe was able to implement shoreline program affecting Indians and non-Indians within reservation); and Santa Rosa Band of Indians v. Kings County 532 F.2d 655 (9th Cir. 1975), cert. denied 429 U.S. 1038 (1977), (county unable to implement its zoning code on Indians living within reservation).

[15] See Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

[16] Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982)

[17] Id. at 964. In Montana v. United States, 450 U.S. 544 (1981), the Court permitted tribes to exercise civil authority over non-Indians on the reservation when their conduct "threatens

The Flathead Tribe was able to implement its shoreline program on Flathead Lake. Thus, *Montana v. United States* does not disturb the exercise of tribal governmental authority as the foundation for civil environmental regulatory jurisdiction over *all* activities on *all* lands within the reservation boundaries.

In *Sechrist v. Quinault Indian Nation*, the Court found that the Quinault Nations zoning and use regulations precluded a non-Indian from developing a recreational vehicle park and campground in an area within the Nation's designated forestry zone.[18] What makes this case particularly relevant to federal or tribal environmental programs is that Sechrist had initially applied to the county for a shoreline development permit, but the Board of County Commissioners informed him that there would be no county action on his application, "in view of the apparent lack of positive jurisdiction."[19] In that case the county recognized the superior right of the Quinault Nation to control the shoreline area within the reservation.

In *Cardin v. De La Cruz*,[20] the Ninth Circuit applied the tests laid out in *Montana v. United States* to uphold the inherent sovereign power of the Quinault Nation to impose its building,

---

or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566.

[18]. *Sechrist v. Quinault Indian Nation,* 9 Indian L. Rep. 3064, 3065 (W.D. Wash., May 7, 1982).

[19]. *Id*. at 3066.

[20]. 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967 (1982).

health and safety regulations on the business of a non-Indian operating on fee lands within the reservation boundaries.[21] The question of consent to jurisdiction was quickly dismissed by the court's explanation that "the Tribe's regulation of [the non-Indian business] is an exercise of legitimate sovereign authority [and] cannot be overturned because of...non-consent."[22]

In Lummi Indian Tribe v. Hallauer the District Court for the Western District of Washington acknowledged the authority of the Lummi Tribe to assert jurisdiction over non-Indians on the reservation to require hook-ups to the Tribal sewer systems.[23] The Court recognized the tribal interest in regulating the lands and houses of non-Indians, especially since the health and welfare of people on the reservation were at stake.[24] The Court stated:

> Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. The same is true regarding the importance of a sewer system to the Lummi Reservation. (citations omitted)[25]

Similar justification exists for tribal and federal protection of the reservation environment, and the exclusion of state regulatory jurisdiction.

Finally, the Ninth Circuit, in Yakima v. Whiteside, recognized the Yakima Tribe's actual and potential authority to regulate non-Indian land use within the reservation in two separate cases that were consolidated for appeal.[26] One case involved a "closed" area maintained by the Yakima Tribe to protect forestry, grazing and wildlife resources. The county attempted to implement a less restrictive zoning plan on this area. The court balanced the respective governmental interests in regulating this tract and found that the county's interests were outweighed by superior interests of the Yakima Tribe.[27]

---

[21] Id. at 364.

[22] Id. at 367.

[23] Lummi Indian Tribe v. Hallauer No. C79-682R, 9 Indian Law Reptr. 3025 (W.D. Wash., Feb. 5, 1982).

[24] Id. at 3026, 3027.

[25] Id. at 3027.

The other case consolidated in Whiteside involved an "open" area, of which approximately one-half was held by non-Indians in fee. The Court rejected the lower court's findings that the Yakima Tribe was unable to zone non-Indian fee land in the open area and remanded the case for further factual development by the lower court.[28] As discussed above, the Court of Appeals for the Ninth Circuit elected to apply the Montana test and determined that the Yakima Tribe had zoning authority under the "more stringent Tribal-interest test employed in Montana."[29]

In sum, as reflected in federal legislation and policy, Indian tribes have now come of age. In keeping with the government-to-government relationship between the United States and Indian tribes, EPA has made a commitment to work with tribes to develop programs to protect the reservation environment. Tribal environmental programs provide a means by which tribes may exercise their governmental powers, assert regulatory jurisdiction and strengthen the fabric of tribal government. Each tribe must be given the opportunity to work with EPA and decide for itself which path to take. The State of Washington should not be permitted to crush this effort.

---

[26]. Yakima v. Whiteside, 828 F.2d 529 (9th Cir. 1987).

[27]. Id. at 535.

[28]. Id. at 530,531.

[29]. Id. at 534.

D. Puyallup and Swinomish Regulation of the Reservation Environment

The Puyallup and Swinomish Tribes have had a long history of involvement in environmental regulation.[30] For example, the Puyallup Tribe has for many years been involved in litigation to protect treaty fishing rights, including lawsuits to protect fishery habitat. Additionally, the Tribe has consistently participated in federal permit processes, raising environmental and policy concerns over potential development projects requiring major federal action.

Since 1978, the Puyallup Tribe has had a court system, and in 1987 the Tribe established the Puyallup Environmental Commission with the mandate to assist the Tribal Council in the development of environmental policy. The Tribe is presently in the process of entering into a cooperative agreement with EPA to build its capabilities under various federal environmental programs. The Tribe recently created and staffed an environmental department which is developing plans for implementing the environmental priorities set by the Tribal Council.

---

[30] These brief comments will supplement the April 14, 1988 letter submitted to EPA by ten prominent Indian law professors in response to the Eikenberry letter referred to above in Note 3. Letter from Professor of Law Ralph W. Johnson, et al. to the Hon. Lee M. Thomas, Administrator of EPA, re: Eikenberry Letter of March 4, 1988 (April 14, 1988).

The central focus of the Puyallup Tribe's environmental efforts will be the water quality and fishery habitat of Commencement Bay and Puyallup Basin. A key goal of the Puyallup Environmental Commission is to rebuild the great natural fish runs central to the way of life of the members of the Puyallup Tribe of Indians. Tribal concern is warranted as evidenced by the recent Superfund remedial investigation which concluded that virtually no significant source control of toxic wastes occurred in the Commencement Bay area until 1985.[31]

The Swinomish Indian Community has been regulating land use and water quality within the exterior boundaries of its reservation since 1986 under the Swinomish Coastal Zone Program. The Tribe recently established an Environmental Commission and is currently negotiating with EPA to provide for cooperative management of tribal environmental resources.

II. FEDERAL POLICY SUPPORTS TRIBAL SOVEREIGNTY OVER THE RESERVATION ENVIRONMENT

Mr. Eikenberry complains of the difficulties of extending state regulatory jurisdiction into Indian Country, and then asserts that, "[l]eadership and direction must come from the federal government."[32] As you are well aware, the federal government has already provided that leadership and direction by supporting tribal control of the reservation environment. The Executive, Legislative and Judicial Branches of the federal government have all recognized tribal authority over the reservation environment.

---

[31] State of Washington, Department of Ecology, Remedial Action Division Office of Hazardous Substances and Air Quality, "Preliminary Investigation-Phase I, Description of Current Conditions." (June 6, 1985)

A. The Executive Branch

As demonstrated by President Reagan's Indian Policy Statement of January 24, 1983, current federal Indian Policy endorses the twin themes of tribal self-government and economic self-sufficiency.[33] Tribal regulation over the reservation environment is supported by Policy Statement of the Executive Branch that:

> Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the Federal Government and should, therefore, have the primary responsibility for meeting those needs... Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis and to pursue the policy of self-government of Indian Tribes without threatening termination. (Emphasis added).[34]

Similarly, the EPA Indian Policy, published in November, 1984, noted the absence of state jurisdiction on Indian lands, and directed the agency to establish "government-to-government" relationships between EPA and Indian tribal governments to implement and enforce federal environmental laws on Indian lands.[35]

---

[32] Eikenberry Letter at 6.

[33] *Supra* note 1; *See also*, President Nixon, Statement of Indian Policy, 116 Cong. Rec. 23258 (1970).

[34] *Supra* note 1.

In late 1985, EPA adopted its "Interim Strategy for Implementation of the EPA Indian Policy," which recognized that:

> [F]orcing Tribal governments to act through state governments that cannot exercise jurisdiction over them (Indian Tribes) is not an effective way of implementing programs overall and certainly is in opposition to the federal policy of working with Tribal governments directly. (Emphasis added).[36]

The Executive Branch has expressly supported development of tribal regulatory control over the reservation environment. We urge EPA to maintain these clearly articulated federal policies.

B. The Judicial Branch

A number of recent court decisions have expressly recognized federal and tribal jurisdiction over the environment in Indian Country to the exclusion of state jurisdiction. Indian tribes have been able to develop air quality standards in the absence of clear Congressional direction.[37] States have been unable to assert jurisdiction over Indian reservations under the Resource Conservation and Recovery Act,[38] and EPA was able to assert jurisdiction to the exclusion of states under the Safe Drinking

---

[35]. Supra note 2.

[36]. U.S. Environmental Protection Agency, Office of Federal Activities, "Interim Strategy for the Implementation of the EPA Indian Policy" (November 1985).

[37]. Nance v. Environmental Protection Agency, 645 F.2d 701 (1981), cert. denied 454 U.S. 1081 (1981).

[38]. State of Washington Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).

Water Act.[39] Moreover, as discussed above, the courts have generally supported tribal efforts to impose comprehensive land use and zoning controls protecting the reservation environment.[40]

The reasoning of these decisions is based on fundamental and longstanding principles of tribal sovereignty as well as the federal government's fiduciary role towards Indian tribes that is superior to any state claims of control or jurisdiction. This reasoning is further clarified by Congress' recent "Indian Amendments" to the fundamental environmental laws which effectively preempt any state claims of jurisdiction over Indian Country.

C. The Legislative Branch

In 1986 and 1987 Congress passed significant amendments to Superfund, the Safe Drinking Water Act and the Clean Water Act, expressly allowing qualifying Indian tribes to assume primacy over environmental programs within the reservation.[41] These Amendments generally allow EPA to afford Indian tribes the same treatment the Agency has given to states. Congress was responding to the federal policy trend of treating tribes on a government-to-government basis. The recent Amendments to the federal environmental laws referred to above further clarify tribal sovereign control over the reservation environment.

---

[39] Phillips Petroleum v. EPA, 803 F.2d 545 (10th Cir. 1986). This case was instigated prior to the 1986 Safe Drinking Water Act amendments that expressly allow tribes to assert primacy for regulation.

[40] Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975); Yakima Indian Nation v. Whiteside 828 F.2d 529 (9th Cir. 1987).

[41] See Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"), 42 U.S.C. §9626; Safe Drinking Water Act, 42 U.S.C. §300f(14); and Clean Water Act, 33 U.S.C. §1377.

The federal environmental statutes provide minimum standards of environmental protection, and allow states and tribes to develop more stringent standards. If either a state or Indian tribe elects to implement standards less stringent than the federal minima, EPA is obligated to step in and run the program. Of particular importance here is the matter of inadequate program enforcement by the State of Washington. The tribes are concerned, and recent actions by EPA to assert federal hazardous waste control over state regulated activities support the validity of the Tribe's position. In fact, the Puyallup Tribe submitted comments to EPA concerning the apparent inadequacy of the state hazardous waste/RCRA program.[42]

---

[42] Comments to 52 Fed. Reg. 35,556 (1987) submitted by Chairwoman Bertha J. Turnipseed to Michael A. Bussell, U.S. EPA (October 21, 1987). In this letter the tribe noted that the Washington Department of Ecology had agreed to voluntarily transfer RCRA authorization back to EPA in the event the 1988 Washington Legislature failed to allocate sufficient funds for RCRA implementation. EPA, in file document on Washington Hazardous Waste Program Authorization (August, 1987), observed that the Washington RCRA Program suffered from:

1. Lack of progress on RCRA permits;
2. Inconsistent documentation of compliance inspections;
3. Inconsistent application and enforcement of state regulations at both existing and illegal land disposal facilities; and
4. Failure of the state enforcement guidelines to address high priority violations in a manner consistent with national policy.

These significant failures of state environmental regulations are of major concerns to Indian tribes that wish to develop federal and tribal protection over reservation lands and waters that could suffer from inadequate state protection. The concerns of other states. Washington's Governor, Booth Gardner, has worked cooperatively with Indian tribes and has not supported Mr. Eikenberry's recent actions.[43] Further, the Washington Legislature has recognized the importance of tribal sovereign jurisdiction within the exterior boundaries of the reservation. In 1988, the Washington Legislature retroceded Public Law 280 jurisdiction back to the Swinomish, Quilleutte and Chehalis tribes.[44]

III. FEDERAL AND TRIBAL REGULATORY SCHEMES ARE APPLICABLE TO INDIAN LANDS

Mr. Eikenberry expressed concern over tribal immunity from state environmental regulation, especially as it applied to non-Indians in Indian Country. This problem is no different from similar situations involving bordering states. Remedies are available under either federal or tribal law for on-reservation activities, just as similar remedies are available under federal or state law for off-reservation activities. In both cases, there are remedies under federal environmental statutes for citizens affected by activities occurring with the jurisdiction of an adjacent state or tribe.[45]

---

[43] Governor Gardner recently voiced strong opposition to the sale of "Treaty Beer" in Washington. Revenue from the sale of this product was to fund an attack on recognized tribal treaty fishing rights.

[44] S.S.B. 6736, 50th Leg., Reg. Sess., 1988 Wash. Legis. Serv. 249 (West).

[45] For instance, the Clean Water Act preserves that ability of citizens to bring nuisance actions for water pollution under the law of the source state. See International Paper Company v. Ouellette, ___U.S.___, 107 S.Ct. 805 (1987).

Furthermore, the federal government, states and Indian tribes can, and consistently have worked out cooperative agreements or memoranda of understanding to protect their respective interests. In sum, one must question whether Mr. Eikenberry is truly concerned about an Indian tribe's use of "Tribal sovereignty to immunize non-Indian business from state environmental regulation."[46]

The Tribes strongly object to Mr. Eikenberry's unsupported implications of alleged harmful effects taking place where industrial activities in Indian Country are purportedly allowed to operate below state environmental and other standards. On the contrary, the tribes fear that lax state enforcement, as evidenced by the failings of the Washington RCRA program, can adversely affect the reservation environment and seriously damage federally recognized Indian treaty rights.[47] Tribal standards can be higher than either federal or state standards.[48]

As EPA recognized in its Indian policy, tribes are in the best position to protect and regulate the reservation environment. Congress has recently provided express recognition of tribal primacy, and made available funding sources so that Indian tribes may further develop their environmental standards and enforcement capabilities. We urge you not to disrupt this federal policy as tribes begin to develop the program expertise possessed by states for many years.

---

[46] Eikenberry Letter at 3.

[47] *See eg*. Seattle Times, Sept. 27, 1987 (article alleging state inaction involving polluter affecting the Puyallup Indian Reservation and Fishery Resources). *See also* *United States v. Washington* (*Phase II*), 506 F.Supp. 187 (W.D. Wash. 1980) (finding a reserved environmental habitat right for tribes entitled to salmon in the Pacific). *Washington v. U.S.* 694 F.2d 1374 (9th Cir.1982) *en banc*, *vacated*, 759 F.2d 1353 (9th Cir.1985) *cert. denied*, ___U.S.___, 106 S.Ct 407 (1985). *See also* *The Environmental Right to Habitat Protection: a Sohappy Solution*, 61 U. Wash. L. Rev. 731 (1986).

[48] For instance, EPA is supporting the Colville Indian Tribes' general ban on underground injection control wells.

IV. JURISDICTION

A. Introduction

Indian tribes and tribal lands are unique under federal law. An 1832 Supreme Court decision by Chief Justice Marshall declared that Indian tribes were:

> [D]istinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guaranteed by the United States.[49]

Justice Marshall's strong recognition of tribal sovereignty, and tribes' commensurate ability to regulate the reservation environment has given way to a more particularized analysis of treaties, statutes and executive orders. The ability of tribes to control the reservation environment, however, has endured.[50]

In 1981, the United States Court of Appeals for the Ninth

---

[49]. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

[50]. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). For commentary on this subject see generally Wilkinson, American Indians: Time and the Law, (1987), and Kronowitz et al., Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations, 22 Harv. C.R.-C.L.L. Rev. 507 (1987).

Circuit supported tribal management of the reservation environment on the Colville Indian Reservation by recognizing that tribal control furthered the purpose for which the Colville Indian Reservation was created. The court recognized the importance of providing "a homeland for the survival and growth of the Indians."[51]

As a general rule, unless Congress specifically states otherwise, states lack civil regulatory jurisdiction on Indian lands and within the exterior boundaries of Indian reservations.[52] Tribal power to regulate those on-reservation activities which may adversely impact the quality of the reservation environment, is derived from two principal sources. The first is tribal proprietary rights: the tribe has all rights and powers of a property owner with respect to tribal property.

A more fundamental and pervasive source, however, is inherent tribal sovereignty, which includes the power to regulate the use of property over which the tribe has jurisdiction and control.[53] Both sources of tribal authority have been strengthened by the recent Congressional delegation of authority to Indian tribes under amendments to the Clean Water Act, Superfund and the State Drinking Water Act.

---

[51] Colville Confederated Tribes v. Walton, 647 F.2d 42, 49 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981).

[52] See McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Bryan v. Itasca County, 426 U.S. 373 (1975).

[53] See Powers of Indian Tribes, 55 I.D. 14 (1934), reprinted in I Opinions of the Solicitor 445, 467; Dept. of the Interior, Federal Indian Law 440 (1958); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, ___-___.(1982).

B. Tribal Sovereignty

A tribe's sovereignty gives rise to its governmental police powers, which may be exercised by means of civil regulatory controls. The most "basic principle of all Indian law" is that powers of Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished."[54] A tribe's inherent sovereign powers extend to both its members and its territory.[55] In 1982 the Supreme Court held that a tribe had the power to levy a severance tax on a nonmember. The Court emphasized the territorial component of tribal sovereignty as follows:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a Tribal government to raise revenues for its essential services. The power does not derive solely from the Indian Tribes' power to exclude non-Indians from Tribal lands. Instead, it derives from the Tribes' general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdic-

---

[54] Powers of Indian Tribes, I Opinions of the Solicitor at 447 (1934). See Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152-54 (1980); United States v. Wheeler, 435 U.S. 313, 322-23 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832).

[55] Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 903 (1982) ("Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'" They "are unique aggregations possessing attributes of sovereignty over both their members and their territory." citing United States v. Mazurie 419 U.S. 544, 557 (1975)). See also Iowa Mutual. Ins. Co. v. LaPlante ___ U.S. ___, 107 S.Ct. 971,975 (1987).

tion. (Emphasis added.)[56]

As early as 1926, the Supreme Court recognized that one of the most basic incidents of sovereignty is a government's power to regulate land use to protect public health and welfare.[57] Some eight years later, the Solicitor of the Department of the Interior asserted that:

> [O]ver *all the lands* of the reservation, whether owned by the Tribes, by members thereof, or by outsiders, *the Tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain*, reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation land under lawful authority. (Emphasis added.)[58]

The Solicitor went on to conclude that:

> In its capacity as a sovereign, and in the exercise of local self-government, [a Tribe] may exercise powers similar to those exercised by any State or nation in regulating the use or disposition of private property, save insofar as it is restricted by specific statutes of Congress.[59]

Thus, Indian tribes retain all aspects of their sovereignty except those specifically withdrawn by Congress or inconsistent with overriding federal interests.[60]

---

[56] *Merrion v. Jicarilla Apache Tribe*, *Supra* note 53 *See also* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). *Crow Tribe of Indians, et al. v. Montana, et al.*, 819 F.2d 895 (9th Cir. 1987), *aff'd*. 108 S.Ct. 685 affirmed, 108 S.Ct. 790 (1988) (granting application to issue judgment); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

[57] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See* *also* *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975); *Knight v. Shoshone & Arapahoe Tribes*, 670 F.2d 900 (10th Cir., 1982), *Yakima v. Whiteside*, 828 F.2d 529 (9th Cir. 1987).

[58] Powers of Indian Tribes, I Opinions of the Solicitor at 467 (1934).

[59] *Id*. at 471.

In 1958, the Court in Williams v. Lee held that tribal courts, not state courts, were the proper forum for a collection action because state jurisdiction would infringe on tribal sovereignty.[61] The Court stated:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[62]

Williams and its tribal sovereignty test continue to be cited by the Supreme Court.

In 1972, the Court in McClanahan v. Arizona Tax Comm'n found that the State of Arizona had no jurisdiction to impose an income tax on a Navajo Indian living on the reservation, with income derived from reservation sources.[63] The Court's reasoning, however, relied more on federal preemption than on tribal sovereignty. As the Court noted:

> The modern cases tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power....The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the

---

[60] See, e.g., Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 153-54 (1980).

[61] Williams v. Lee, 358 U.S. 217,220 (1958).

[62] Id.

[63] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 163 (1972).

applicable treaties and statutes must be read.[64] Sovereignty remains a factor, but is no longer the sole, or the paramount bar to intrusion of state interests.

In 1987 the Supreme Court recognized the power of tribal sovereignty as a basis for protecting tribal interests, finding that tribes retained attributes of sovereignty over members and territory to the extent it has not been withdrawn by federal law.[65] In Iowa Mutual Ins. Co. v. LaPlante, Justice Marshall noted that tribal courts had initial jurisdiction in diversity jurisdiction cases, remarking that:

> Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence ... is that the sovereign power ... remains intact.[66]

Tribal sovereignty provides authority for tribes to regulate the lands and waters within their reservations.

Additionally, the Supreme Court has bolstered tribal sovereignty by recognizing that tribal courts have initial jurisdiction over federal question and diversity cases.[67]

C. Property Ownership and Control

---

[64] Id.

[65] Iowa Mutual Ins. Co. v. LaPlante ___ U.S. ___, 107 S.Ct. 971, 975-978 (1987).

[66] Id. at 978, citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982). See also White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-3 (1980) (noting separate preemptive and sovereign barriers to assertions of state sovereignty).

[67] Supra note 63 Iowa Mutual Ins. Co. (diversity jurisdiction); Nat. Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) (federal question jurisdiction).

As a property owner, a tribe may control activities on lands it owns in fee or which are held by the federal government in trust for the benefit of the tribe.[68] As the Solicitor for the Department of the Interior stated in 1958:

> Over Tribal lands, the Tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.[69]

The right of tribal governments to "regulate through exclusion" can be based on proprietary as well as sovereign powers.[70] Exclusion has been held to be a separate source of Tribal power apart from sovereign tribal rights, In Merrion v. Jicarilla Apache Tribe the Supreme Court found:

> Nonmembers who lawfully enter Tribal lands remain subject to the Tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. (emphasis original).[71]

Another tribal property right that enhances the ability of tribes to develop and implement environmental programs are tribal reserved rights. Examples of such reserved rights may be found in the area of water law, where, in United States v. Winters, the

---

[68]. See Federal Power Over Indians, 132 U. Penn. L. Rev. 194, 219-222 (for discussion of the relationship of tribal property rights to the federal government's plenary power). See also Morris v. Hitchcock, 194 U.S. 384 (1904); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958).

[69]. Cohen, Handbook of Federal Indian Law at 438 (1942) (quoting Solicitor's Opinion of Oct. 25, 1934), cited in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 146n.12 (1982). (emphasis supplied by the Supreme Court).

[70]. 455 U.S. at 176 (1982).

[71]. Id. at 144.

Supreme Court found that establishment of an Indian reservation implied reservation of a proprietary water right necessary to make the reservation livable.[72] The right to a quantity of water, without the ability to protect its quality, may prove a hollow promise. Thus, an implied environmental quality right necessarily attaches to this property right.

In Winters, the Court's holding was based upon its conclusion that, without such a reserved water right, the land of the Fort Belknap Reservation would have been valueless. Implied Indian water rights have also been held to exist where water was "essential to the life of the Indian people."[73] Here again, the right to a quantity of polluted water is likewise valueless.

In Colville Confederated Tribes v. Walton,[74] the Ninth Circuit applied the reserved water right doctrine to the Colville Reservation and determined that:

> As in Winters, the Indians relinquished extensive land and water holdings when the reservation was created. Some gave up valuable tracts with extensive improvements....Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless....We hold that water was reserved when the Colville Reservation was created.[75]

This reserved right has been recognized as protecting a tribal fishery that existed from time immemorial.[76]

---

[72] United States v. Winters, 207 U.S. 564, 576 (1908). See also Arizona v. California, 373 U.S. 546, 599 (1963).

[73] Arizona v. California, 373 U.S. 546, 599 (1963) (recognizing the importance of water for "the animals [the Indians] hunted and the crops they raised").

[74] Colville Confederated Tribes v. Walton, supra note 7 at 4.

[75] Id. at 46-7.

A necessary corollary to the tribal reserved water right is therefore a tribal right to *unpolluted* water.[77] The value of a tribe's reserved water right is, of course, inextricably intertwined with the quality of such waters. The federal government is obligated to protect habitat affecting water quality or other off-reservation resources when tribes have a right to such resources.[78] Therefore on a case by case basis, Indian tribes have a further right to prevent man-made despoliation of wildlife and fisheries habitat important to the tribe's way of life.[79]

---

[76] *Id*. at 45-48. *See also Joint Board of Control v. United States and Tribes*, 832 F.2d 1127 (9th Cir. 1987).

[77] Examples of the water quality aspect of *Winters* rights are: *Pyramid Lake Paiute Tribe v. Morton,* 354 F. Supp. 252 (D.D.C. (1973) (Preventing a water diversion that would disrupt the salinity and erosion balance of Pyramid Lake and damage the tribal fishery resource); and *Confederated Salish and Kootenai Tribes, etc. v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982), *cert. denied,* 459 U.S. 977 (1982) (recognizing tribal authority to regulate the shores of Flathead Lake when shoreline activity threatened increased water pollution and damage to the Lake's ecology).

[78] Discussion of off-reservation environmental protection is beyond scope of this analysis. *But See Colorado v. New Mexico*, 459 U.S. 176 (1982) (where the Court held that a state's right to water under the equitable apportionment doctrine imposes a duty on sister states to protect water quality); *United States v. Washington* (Phase II), 506 F.Supp. 187 (W.D. Wash. 1980) (finding a reserved environmental right for tribes entitled to salmon in the Pacific Northwest) *See Supra* note 46 at 18.

[79] *See Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985); *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985), *cert. denied*, ___U.S.___, 106 S.Ct. 1183 (1986); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); and *Joint Board of Control of the Flathead, Mission and Jacko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987).

Two recent decisions of the United States Court of Appeals for the Ninth Circuit indicate that the scope of the tribal environmental quality right may be very broad. In United States v. Adair, the Ninth Circuit held that an off-reservation water right necessary to support the hunting and fishing of tribal members was implicitly reserved by treaty.[80] The Court concluded that the scope of this right was measured by the moderate living needs of the tribes.[81]

In Joint Board of Control of the Flathead, Mission and Jacko Irrigation Districts v. United States, the Ninth Circuit reversed the lower court's application of "equitable sharing" in determining priority between a non-Indian claim for irrigation water as against a tribal claim for water necessary for fish survival and held that the reserved rights of the tribe arose "without regard to equities that may favor competing water users."[82]

Moreover, as a proprietor of land, a tribe may condition entry upon its lands on compliance with tribal law. The tribe also has the power to exclude non-members from Indian lands.[83]

D. Federal Preemption and the Court's Balancing Test

In no case has a court allowed state jurisdiction to prevent implementation of a federal or tribal program to protect either the health or welfare of the reservation population or the quality of the reservation environment.[84] In part, this is due to the increasing federal-tribal partnership in the development and implementation of environmental programs in Indian Country.

---

[80] United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

[81] Id.

[82] Joint Board of Control of the Flathead, Mission and Jacko Irrigation District v. United States.

[83] Merrion v. Jicarilla Apache Tribe, 455 U.S. at 145-46.

Absent specific congressional authorization states are barred from establishing (or preventing the Indian tribes from establishing) environmental programs in Indian Country. As the Supreme Court noted in White Mountain Apache Tribe v. Bracker:

> [C]ongressional authority and the 'semi-dependent position' of Indian Tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over Tribal reservations and members. First the exercise of such authority may be preempted by federal law. Second it may unlawfully infringe 'on the rights of reservation Indians to make their own laws and be ruled by them.' The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by Tribal members. (citations omitted).[85]

The Court further recognized in Washington v. Confederated Tribes of Colville that, Tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[86] Thus, Indian tribes have authority to develop environmental programs that implement and do not conflict with Congress' comprehensive environmental laws thereby meeting the *Colville* test.

---

[84] United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164,172 (1973) ("[t]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption").

[85] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980).

[86] Washington v. Confederated Tribes of Colville, 100 S.Ct. 2069,2081 (1980).

In *California v. Cabazon Band of Mission Indians*, for example, the Supreme Court held that neither P.L. 280 nor the interests of the State provided a sufficient basis to allow the state to regulate bingo on Indian reservations.[87] The Supreme Court further determined that federal and tribal interests in tribal self-government in bingo operations outweighed state interests.[88]

Tribal and federal environmental programs on Indian reservations likewise foster tribal self-government and outweigh asserted state interests. Federal policy now favors tribal self-sufficiency, independence and self-government.[89] To further these goals, it is therefore necessary to give maximum recognition and deference to sovereign Indian tribes in their efforts to regulate and manage the reservation environment.

---

[87]. *Id* at 1083, 1087-91 (1987).

[88]. *Id.* at 1092-94.

[89]. Note also Congress' policy of self-determination as evidenced by the Indian Financing Act of 1974, 25 U.S.C. 1451 (1983); the Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. §450a(b); Indian Gov't State Act of 1983, 25 U.S.C §7857; and recent amendments to federal environmental statutes giving Indian tribes the authority to be treated equally as states. For example: The Clean Water Act, 33 U.S.C. §1377 (providing that Indian tribes meeting certain conditions will be treated in a manner similar to states); the Safe Drinking Water Act, 42 U.S.C. §300f(14) (authorizing EPA to treat Indian tribes, in circumstances similar to those required under the CWA, as states); and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), 42 U.S.C. 9626 (providing that governing bodies of Indian tribes are afforded substantially the same treatment as states) and §9607(f)(1) (acknowledging liability to Indian tribes for natural resource damages to Indian lands and resources).

further bolstering tribes' authority to exercise civil enviornmental regulation in the U.S. Supreme Court's decision in Montana v. United States.[90] In determining that the Crow Tribe lacked authority to regulate fishing by non-Indians on fee lands, the court carved out several broad exceptions supporting tribal sovereignty. The court held that tribes:

> retain inherent power to exercise civil authority over the conduct of non-indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. (emphasis added).[91]

A tribe's exercise of civil environmental regulation goes to the heart of the exceptions described in the Montana decision.[92] Self-regulation of environmental programs is essential to the economic security and the health and welfare of the Tribes. On the one hand investment capital is likely to shy away from jurisdictional disputes. On the other hand a known and undisputed on-reservation regulatory environment is likely to attract on-reservation economic development. Moreover, the membership of a tribe is more likely to support development activities that will be tribally controlled and regulated. Tribally-managed environmental programs also support federal policy recognizing Indian sovereignty and encouraging tribal self-government.[93]

---

[90] 450 U.S. 564, (1981); See Supra note 17.

[91] Id. at 566.

[92] In Yakima v. Whiteside, 828 F.2d,at 535, in its balancing of tribal interests against state interests, the Ninth Circuit recognized the importance of a tribal zoning code to the tribe's ability to maintain: 1) political authority; 2) economic support through protection of grazing, forest and wildlife resources; 3) religious and spiritual values; and 4) environmental factors such as soil disturbance and erosion, air quality, water impacts, noise, population density and impacts on vegetation and wildlife.

V. FEDERAL TRUST RESPONSIBILITY

The federal government has an obligation to assist Indian tribes and the courts have recognized the nature of this relationship as a trust, or fiduciary obligation. In a case finding that a county had no authority to zone Indian use of trust land within a reservation, the Ninth Circuit found:

> The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status toward the Indian - a status accompanied by fiduciary obligations.[94]

The trust obligation in the area of tribal environmental regulation has been clarified by the 1986 and 1987 amendments to the Clean Water Act, the Safe Drinking Water Act and Superfund. The federal government risks breach of its fiduciary obligations if it changes its policy of implementing federal and tribal environmental programs, particularly due to its recent history of federal and tribal protection of environmental resources.

In United States v. Mitchell, (Mitchell II), the Supreme

---

[93]. Yakima v. Whiteside supra at 533.

[94]. Santa Rosa Band of Indians v. Kings County 532 F.2d 655 (9th Cir. 1975). See also Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

Court found that a fiduciary obligation arose between the Quinault Nation and the United States due to the role played by the Government in management of tribal forest resources and in light of the Tucker Act.[95] The Court stated that:

> a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.[96]

EPA's Indian Lands Policy represents an appropriate continuation of the federal trust responsibility to the Indian peoples.

VI. CONCLUSION

The Colville, Puyallup and Swinomish Tribes urge you to announce your continued commitment to the already well-articulated federal Indian environmental policy. The Tribes are committed to protecting and enhancing the quality of the reservation environment, and believe that this is best accomplished by continuing the close working relations that EPA and Indian tribes have developed in recent years.

Respectfully submitted this 6th day of June, 1988.

Richard A. Du Bey

RICHARD A. Du BEY
Special Environmental Counsel
to the Colville Confederated
Tribes, the Swinomish Indian
Community, and the Puyallup
Tribe of Indians.

---

[95] 463 U.S. 206, 225 (1983).

[96] *Id.*

Rec'd 6/6/88

Ken Eikenberry
ATTORNEY GENERAL OF WASHINGTON
7th FLOOR, HIGHWAYS-LICENSES BUILDING • OLYMPIA, WASHINGTON 98504-8071

June 3, 1988

RECEIVED
JUN 20 1988
LAW OFFICES OF
RICHARD A. DU BEY

Mel Tonasket, Chairman
Colville Business Council
Colville Confederated Tribes
P. O. Box 150
Nespelem, WA 99155

Dear Chairman Tonasket:

During my recent meeting with you and other Washington tribal leaders you expressed serious concerns over a December 9, 1987 letter I sent to Attorney General Edwin Meese III. Concerns were also expressed about a March 4, 1988 paper on EPA Indian Policy distributed on National Association of Attorneys General letterhead under my signature. At your request, and to address concerns raised, I agreed to issue a clarifying letter.

You and others have identified three principal concerns. First, the letters have been viewed by some as an attack on Indian sovereignty. Second, the documents do not acknowledge the importance of state-tribal negotiation and cooperative agreements as a means of resolving state-tribal disputes. Finally, the letters have been viewed by some to be critical of the tribes' desire to preserve and protect reservation environments. My response to those concerns follows.

First, regarding Indian sovereignty, this office certainly acknowledges that Indian governments have been characterized by the United States Supreme Court as limited sovereigns with powers to exercise governmental powers over citizens, lands and resources. The history of this office under my administration has been one of dealing with Washington tribes on a government to government basis. The difficulty, of course, is determining under the current state of the law the extent of the sovereign powers of state and tribal governments.

Second, regarding state tribal cooperative agreements, this office recognizes the value and importance of negotiation to resolve state tribal differences. During my administration more staff resources have been devoted to assisting state officials negotiate with Indian tribes than in litigating against them. Numerous attorneys in our office have devoted substantial time and resources in tribal negotiations relating to fisheries management, the Timber/Fish/Wildlife agreement, Puget Sound shellfish, the Clean Water Act, Indian hunting rights, aquatic land management and use, Indian religious and cultural rights, gambling, liquor, industrial safety, juveniles, child abuse and other subject matters. State tribal agreements of national significance, including fisheries management, the Timber/Fish/Wildlife accord and the Colville 208 Plan have been achieved in this state by state officials with the assistance of attorneys in this office and I anticipate more such agreements occurring in the future. At the request of the Colville tribal leadership, and as a symbol of the government to government relationship, I personally traveled to the Colville Tribal Center to participate in the announcement of the state tribal agreement on the Colville 208 Plan. The express policy of this office regarding tribal matters is to negotiate where possible. Litigation is a last, not a first alternative.

The third expressed concern is the perception that the letters demonstrate a lack of confidence in the tribes' desire to preserve and protect reservation environments. We are well aware of the proud tradition of American Indians in protecting and preserving their natural environment for cultural, religious and other reasons. We are confident that, given the necessary resources, most if not all tribes would implement and administer strong environmental protection programs. We have been most impressed, for example, with the level of commitment and resources which the Colville Confederated Tribes have devoted to implementation of reservation environmental programs.

Not all tribes, however, have the resources to undertake ambitious environmental programs and some tribes have such small land areas that an independent environmental program would have great difficulty in being effective. EPA is neither equipped nor funded to effectively administer and enforce local programs. EPA funding for training and start up costs for reservation environmental programs is extremely limited. In many instances now, state environmental programs are being administered by states on non-Indian lands within the boundaries of Indian reservations. We question whether the environment will best be served if these funded state programs are displaced by federal minimum standards administered and enforced by EPA. For some reservations the answer may be in the affirmative and for others the negative. Our concerns expressed to EPA are based on the fact that no consideration is given to what the response is or will be in specific areas. These issues may be fairly raised at a time when a dominant federal/tribal policy is to encourage economic development and industry on reservation. To the extent Indian and non-Indian citizens are impacted, both on and off the reservation, state governments have a legitimate interest in these developments.

The message which the states have been receiving from EPA is that for legal reasons the states have absolutely no role in environmental protection on reservations. It is that message and its legal foundation which we are questioning and seeking clarification from EPA.[1] We believe that state law programs can and should continue to play an important role in protecting reservation environments particularly with respect to fee property. We also understand that this can be most effectively done in the context of state tribal cooperative agreements where state and tribal governments are able to coordinate their activities in the interest of a cleaner environment.

Having said the foregoing, I would like to refer to the recent writings of Professor Charles Wilkinson, the respected Indian advocate and scholar, who presents the message we intended to convey in a manner perhaps more acceptable to the tribal point of view. After discussing McBratney v. United States, 104 U.S. 621 (1882), the first and pivotal U.S. Supreme Court decision which legitimized the application of state law in Indian Country, Professor Wilkinson states:

> ". . . McBratney evidences one essential policy choice that the Supreme Court made and continues to honor: absent a highly explicit federal statute to the contrary, state laws prevail over tribal and federal laws in regard to an activity that occurs in Indian country and that is not directly involved with legitimate tribal concerns. This is due to an implicit recognition of the historical and contemporary fact that considerable numbers of people are continually in Indian country for reasons that have little or no connection with Indians. Matters among non-Indians go to the states and matters among Indians go to the tribes. Those baselines are now set, absent explicit federal

---

[1] We have agreed, through conversations with EPA, to submit a focused list of questions for EPA response. We have some indications from EPA that their position is not as contrary to our position as we once believed. These questions, and others, are being discussed in the Indian Affairs Working Group environment subcommittees and our hope is that this dialogue will produce results which will accommodate federal, state and tribal interests.

provisions to the contrary."[2]

Professor Wilkinson is correct in this respect. The rub, however, is determining whether an activity in Indian Country truly affects tribal self-government. It is on that critical point that the courts have left a confused trail and about which lawyers may endlessly disagree. Professor Wilkinson continues regarding this gray area not clearly defined by the Supreme Court:

> "There are, however, myriad questions in between, including for example, Can a state tax a non-Indian businessperson who would pass the tax savings along to tribes or individual Indians? Can a tribe tax that businessperson or shut down the operation for health reasons? Does it matter--and, if so, how much--whether the non-Indian does business on fee land? Must a non-Indian businessperson seek review of the tribal council's ruling first in tribal court? Is he or she allowed to seek review of the tribal action in federal court? And what if the complaint at the bottom is that the tribal council or tribal court is racist? In turn, these questions require a reconciliation of even broader concerns: How can tribalism be squared with the legal and moral dictates of equal protection and egalitarianism? What is the role of the states in Indian country, and of the tribes in the constitutional democracy?"[3]

Professor Wilkinson's final questions capture the essential concerns raised by our earlier correspondence: What is the role of states in Indian country? What is the role of tribes in the constitutional democracy? These are questions whose answers may not be found in federal court decisions but which state and tribal governments must address in very real world situations. Because these fundamental uncertainties arise from a void in federal law resulting from a century of oscillating federal Indian policy, our earlier correspondence was addressed to federal officials. While state-tribal negotiations may play an important role in resolving many local situations, only the federal government may resolve the larger fundamental questions.

Before closing, I must note that some people, not including you, have been making statements critical of Washington State's record in litigating Indian cases. These statements imply that while I have been Attorney General this state has pursued needless litigation with an attendant waste of resources at the expense of state citizens. This is patently false with respect to the seven years of my administration. Under my administration, this office has won more Indian cases than it has lost. While precise tallies are difficult because it is possible for both sides to prevail on different issues in a single lawsuit, the most recent six federal court Indian-related decisions, including three in the Ninth Circuit and three in the district court, the state was the prevailing party.[4] We recognize the possibility exists that some of the cases which are ongoing could result in a reversal or modification. In future Indian litigation, this office will undoubtedly win some and lose some. The essential point remains that this office under my administration has a distinguished record in tribal matters both in demonstrating a willingness to work in good faith at the negotiating table and in Indian litigation.

---

[2] Wilkinson, "American Indians, Time, and the Law," at 88-89.

[3] Id.

---

[4] In *U. S. v. Washington* (Attorneys Fees), 813 F.2d 1020, March 31, 1987, cert. den. (U.S. S.Ct. #87-1390) May 2, 1988), the Ninth Circuit vacated the district court's award of approximately $3,000,000 in attorneys fees to the tribes for the Boldt Phase I litigation. In *Mason v. Clark*, the Ninth Circuit rejected an Indian-based claim to portions of Ft. Columbia State Park (Ninth Circuit, No. 86-4314, filed March 10, 1988). In *Holly v. Totus*, Ninth Circuit, unpublished opinion filed April 13, 1987 (#85-4436), cert. den. 56 U.S. Law Week 3243 (October 5, 1987), the Ninth Circuit invalidated the Yakima tribal water code in its application to non-Indians on reservation. In *United States and Suquamish v. Aam*, the federal district court rejected the Suquamish Tribe's claim to thirteen miles of Puget Sound tidelands abutting their reservation. U.S.D.C., W.D.WA, Nos. C82-1522V, C82-1549V, August 26, 1987, currently on appeal to Ninth Circuit. In *United States and Kalispel Tribe v. Pend Oreille County PUD Dist. No. 2 and State of Washington*, the district court rejected the Kalispel Tribes' claim of aboriginal title to the bed of the Pend Oreille River. U.S.D.C., E.D.WA, Dec. 14, 1987, currently on appeal to Ninth Circuit. *U.S. v. Washington*, (subproceedings Bellingham Bay Equitable Adjustment), U.S.D.C., W.D.WA, Civil No. 9213-Phase I, subproceeding 86-7, magistrate's report and recommendation following trial rejecting Lummi Tribe's claim that Bellingham Bay is included within the reservation, filed August 27, 1987, currently pending before the Federal District Court.

This office is now, and has been under my administration, available to provide legal support to state officials who are working with tribal governments on state-tribal matters. We look forward to continued good relationships with tribal governments.

Very truly yours,

Ken Eikenberry

Ken Eikenberry
Attorney General

KOE:jdh

cc: Honorable Edwin Meese III, Attorney General
Honorable Lee Thomas, Administrator, EPA

Permit No. WA-0[illegible] 83-3
Issuance Date:
Effective Date:
Expiration Date:

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
WASTE DISCHARGE PERMIT

State of Washington
DEPARTMENT OF ECOLOGY
Olympia, Washington 98504

In compliance with the provisions of
Chapter 90.48 RCW as amended
and
The Clean Water Act as amended
Public Law 95-217

Cavenham Forest Industries, Inc.
Route 2, Box 54
729 S. Jackson Street
Omak, Washington 98841

Plant Location: 729 So. Jackson St. in East Omak, Washington

Receiving Water: Okanogan River via Omak Creek. (River Mile 32)

Industry Type: Forest Products Manufacturing (sawmill/plywood)

Discharge Location:

Latitude: 48° 23' 48"
Longitude: 119° 30' 17"

Waterway Segment Number: 22-49-02

---

is authorized to discharge in accordance with the special and general conditions which follow.

Marc A. Horton
Deputy Director
Department of Ecology (7)

SPECIAL CONDITIONS

S1. FINAL EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

Beginning on the date of issuance and lasting through the expiration date of this permit, the permittee is authorized to discharge, non-contact cooling water from the plywood compressor cooling water system and the powerhouse condenser cooling system to Omak Creek. Non-contact cooling waters from the No. 2 planer cooling and planer compressor cooling may be discharged to a dry well. Non-contact cooling waters from the No. 1 planer cooling may be discharged to the City of Omak municipal sewage system with all of the above cooling water discharges being subject to the following specific limitations and monitoring requirements:

OMAK CREEK

Non-contact Cooling Water Effluent Limitations

Parameter	Monthly Average Summer	Monthly Average Winter
Flow (gallons per day)	1,504,800	4,543,200
Temperature	80°F	80°F
pH	Within the range of 6.5 to 8.5	

OMAK CREEK

Non-contact Cooling Water Effluent/Receiving Water
Monitoring Requirements

Parameter	Sample Point	Sample Type	Frequency
Temperature °F	Millpond overflow	Grab	Monthly
	Omak Creek Above	Grab	Monthly
	Omak Creek Near Mouth	Grab	Monthly
	Okanogan River Immediately Upstream	Grab	Monthly
	Okanogan River within 300 ft Downstream	Grab	Monthly
pH	Millpond Overflow	Grab	Quarterly
	Omak Creek Above	Grab	Quarterly
	Omak Creek Below	Grab	Quarterly
Flow	Millpond Overflow	Measure	Monthly
	Omak Creek Above	Measure	Monthly
	Omak Creek Below	Measure	Monthly

If the monitoring program outlined above identifies a significant impact on the water quality of the Okanogan River, exhibited as Okanogan River water quality standard violations, Cavenham Forest Industries, Inc. will immediately implement actions necessary to eliminate any standards violations and prevent their reoccurrence. Such actions will include effluent treatment to reduce temperature, flow reduction or both. Further, Cavenham Forest

Industries, Inc. must continue to develop and implement a wastewater treatment or recycling system designed to ultimately elimiate the discharge of process wastewater and to reduce the flow and temperature of the non-contact cooling water discharge(s).

DRY WELL

Non-contact Cooling Water Effluent Limitations

Parameter	Monthly Average Summer	Monthly Average Winter
Flow (gallons per day)	57,600	57,600
Temperature	80°F	80°F
pH	Within the range of 6.5 to 8.5	

DRY WELL

Non-contact Cooling Water Effluent Monitoring Requirements

Parameter	Sample Point	Sample Type	Frequency
Flow (gallons per day)	Discharge to Drywell	Grab	Quarterly
Temperature °F	Discharge to Drywell	Grab	Quarterly
pH	Discharge to Drywell	Grab	Annually

CITY SEWER

Non-contact Cooling Water Effluent Limitations

Parameter	Monthly Average Summer	Monthly Average Winter
Flow (gallons per day)	7,200	7,200
Temperature	80°F	80°F
pH	Within the range of 6.5 to 8.5	

FISH AND WILDLIFE DEPARTMENT
COLVILLE CONFEDERATED TRIBES
P.O. BOX 150 · [illegible] 634-4711, EXT. [illegible]

June 2, 1986

TO: Gary Passmore
Hydrologist

FROM: Jerry Marco JM
Fishery Biologist

SUBJECT: NPDES Permit Application – Cavenham Forest Industries, Inc., Omak.

I have reviewed the information you sent over on the permit application and have a few concerns. My major concern centers around cooling water discharges to Omak Creek. The fact sheet (page 3) stated that "Omak Creek is a seasonal stream in that it is usually dry, during a period of time each summer, upstream from the Crown Zellerbach millpond overflow". I would argue this statement and classify Omak Creek as a perennial stream which flows year around and this change in classification may alter the permit requirements.

In any event, the significant increase in water temperatures associated with the discharge indicate a detrimental effect to fish and other aquatic organisms in the stream. Also, Omak Creek has been designated for salmonid habitat restoration as part of the Fishery Resource Mitigation with Douglas County PUD. In the event steelhead or salmon are reintroduced into Omak Creek they will have to migrate through the stream section in question and could have problems migrating if water temperatures are increased to levels found in past monitoring studies.

I also have a problem with discharging cooling water into the Okanogan River since temperature related problems with migratory salmonids presently exists. However, it appears difficult to argue with water quality data presented in the fact sheet. I would be interested in looking at water quality data for the past five years and comparing temperature data above and below Omak Creek.

Colville Confederated Tribes
P.O. Box 150 - Nespelem, Washington 99155 (509) 634-4711

MEMORANDUM

TO: [redacted]

FROM: Gary Passmore

DATE: June 4, 1986

SUBJECT: NPDES Permit for Cavenham Forest Industries, Inc., Omak

Following are my comments and concerns based on review of the "Fact Sheet" provided by D.O.E.

Fact Sheet

Page 1: Implies that receiving water is the Okanogan River when in fact it is Omak Creek. The State WQS classify Omak Creek as AA, the Tribe as II.

Page 2: Groundwater in the vicinity of the lagoons contained anomalously high levels of tannin, color, iron, and manganese. Water level data indicates that water flows from the lagoons toward the two domestic wells east of the lagoons. These wells have been rendered useless for human consumption and other purposes by these so-called "aesthetic" problems.

Page 3: Omak Creek is not a seasonal stream. In fact it is a perennial stream with an average flow of approximately 20 cfs. The creek has for short periods gone dry in certain reaches during years of extremely low precipitation and high temperatures. Dry reaches brought about under extreme drought generally occur sporadically between the St. Mary's Mission diversion dam and the Cavenham Mill yard. Such conditions can be expected to occur less than five percent of the time. Furthermore, Omak Creek has an existing trout fishery and is the only on-reservation stream capable of providing habitat for Columbia River salmonids.

Page 4: Washington water quality standards state that "when natural conditions exceed $16^{o}C$..., no temperature increase will be allowed which will raise the receiving water temperature by greater than $0.3^{o}C$. (WAC 173-201-405 1(c) iv).

The State WQS also state that "temperature increases shall not at any time, exceed $t = 23/(T+5)$" where t = permissive temperature change across a dilution zone, and T is the highest receiving water temperature out of the dilution zone. Using the data on

6/5/86

page 4 the temperature increases allowable under State WQS would be respectively: $t = 23/(19.5 + 5) = 0.94^{\circ}C$; or $t = 23/(17+5) = 1.05^{\circ}C$.

Omak Creek is a Tribal Class II WQS water wherein "When natural conditions exceed 18°C (freshwater) . . . no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C. And Temperature shall not exceed 18°C due to human activities. Temperature increases shall not, at any time exceed $t = 28/(T+7)$ (Tribal WQS 33.01.060 2(c) vi) Using the data on page 4 the temperature increases allowable under Tribal laws would be respectively: $t = 28/(19.5 +5) = 1.14^{\circ}C$; or $t = 28/(17 + 5) = 1.27^{\circ}C$ (Tribal definitions for T and t are identical to the States).

The September 1, 1976 data listed on page 4 shows an increase from 19.5°C (67°F) to 25.0°C (77°F), or +5.5°C.

The September 2, 1976 data shows an increase from 17°C (63°F) to 25.4°C (77.8°F) or + 8.4°C.

Both of these figures violate both Tribal and State standards. The discussion on page 4 centers on impacts to the Okanogan River and ignores impacts on the receiving water (Omak Creek).

The foregoing illustrates that a valuable perennial stream is being used as a heat-sink wasteway for hot water with no regard to the biological impacts in the stream itself. This is contrary to the Clean Water Act's antidegradation provisions.

Page 5: Cavenham Forest Industries, Inc. is charged with ultimately eliminating the process wastewater and reducing the volume and temperature of non-contact water yet no schedules or technical solutions are discussed. The permit should establish a timetable and work plan to meet the water quality standards.

GWP:vfb

cc: Gerry Marco
Richard Du Bey
file

FACT SHEET

Cavenham Forest Industries, Inc. Permit No. WA-000083-3
Omak Operations
Route 2, Box 54
729 S. Jackson Street
Omak, Washington 98841

Receiving Water and Point of Discharge

Okanogan River via Omak Creek within the NW¼ of the NE¼ of Section 36, Township 34 N., Range 26 E.W.M. in Okanogan County.

Applicable Water Quality Standards

The applicable water quality standards are those adopted by the State of Washington effective June 2, 1982. The receiving water is designated as Water Quality Limiting — Nonpoint Source, Class A waters. Water quality of this class shall exceed the requirements for all, or substantially all, uses.

Existing Situation

Cavenham Forest Industries, Inc. is involved in forest products manufacturing including sawmill and plywood operations.

This industry produces three categories of wastewater discharges; one being cooling water discharges with a monthly summer average combined flow of 1,569,600 gallons per day (gpd) and a monthly winter average combined flow of 4,608,000 gpd; two being a process wastewater discharge with a monthly summer average combined flow of 3,715,200 gpd and a monthly winter average combined flow of 676,800 gpd; and three being sanitary waste discharge with a monthly average of 15,000 gpd.

The maximum quantity of 5,284,800 gpd constitutes both the primary and secondary water uses which are supplied from wells located within the mill complex. Of the primary uses, 259,200 gpd is discharged as process wastewater to the lagoons. The remaining 5,025,600 is used as powerhouse condenser cooling water and is then recycled as a source of process and cooling water (secondary uses). Any excess is discharged to Omak Creek from the millpond.

The secondary process wastewater constitutes 3,715,200 gpd (summer average) from compressor cooling, veneer dryers, steam vats, log sprinkling, powerhouse, sawmill, and plywood roof. This process water is collected and discharged to the industrial wastewater lagoons.

The secondary cooling water uses constitute 136,800 gpd, discharged to dry wells, Omak city sewer or Omak Creek.

The 15,000 gpd domestic water source is from the City of Omak with the discharge being to the City of Omak municipal sewage system.

The 3,715,200 gpd (summer average) process wastewater is a secondary use or reuse of cooling water as shown in Table 2. The process or secondary use of water from compressor cooling, veneer dryers, steam vats, planer cooling, log sprinkling and etc., is collected and discharged to settling ponds, lagoons, or dry wells for treatment and disposal via evaporation and seepage through the ground. A planer cooling discharge of 7,200 gpd is to the Omak City Sewer, and a compressor cooling discharge of 72,000 gpd is discharged into Omak Creek via the millpond.

Background Information

These existing forest products manufacturing facilities were originally operated by Biles-Coleman Lumber Company followed by Crown Zellerbach Corporation. In an effort to eliminate process wastewater discharges to Omak Creek, Biles-Coleman proposed construction of the existing lagoon system. Initially, it was intended that the treated wastewater would be discharged to the Okanogan River and the necessary discharge lines and flow measuring device were provided. This concept, however, was not ultimately approved and the actual submerged outfall was not constructed. The lagoon system has since operated as a non-overflow treatment and disposal system with the discharge lines and measuring devices having been removed in 1985.

In 1975 the Biles-Coleman operation was purchased by Crown Zellerbach. Since the change in ownership the operation has remained largely intact with the exception of the furniture factory elimination. Wastewater collection treatment and disposal has progressed with the continued use of the industrial wastewater lagoon system.

Transfer of ownership from Crown Zellerbach to Cavenham Forest Industries, Inc. was effective on April 29, 1986 with no proposed changes in addition to those noted herein.

During the period from July, 1980 through February 13, 1985, the lagoon system was investigated as a possible source of groundwater contamination. The Okanogan County Health Department, Washington Department of Ecology, Colville Confederated Tribes, Crown Zellerbach Corporation, Washington Department of Social and Health Services, and the U.S. Environmental Protection Agency, all participated in this investigation.

Crown Zellerbach's data from six monitoring wells, nine domestic wells, the lagoons, Okanogan River and Omak Creek indicated that:

- Groundwater in the vicinity of the ponds contained measurable amounts of tannins.
- Water from both the study wells and the control wells (located approximately one half mile upriver from the lagoons) exceeded some Secondary Drinking Water Standards. These elevated levels indicate that well water near the Okanogan River normally exceeds these aesthetic standards.
- The elevation of the water table and direction of flow of the groundwater have been altered by the usage of the ponds.

The Department of Ecology, with Department of Social and Health Services and the Environmental Protection Agency, reviewed the literature regarding the significance of tannins in drinking water. It was concluded that EPA has no criteria for tannic acid and that tannins themselves are not generally considered toxic.

The EPA collected samples from one of the lagoons and a number of area wells on January 10 and September 9, 1984. The EPA notified the Colville Tribe that through their two sampling efforts they were unable to confirm the presence of any of the compounds occurring on the list of primary drinking water standards, or on the list of priority pollutants. Further, the EPA was unable to find any conclusive evidence that directly associates the groundwater quality at the water wells with any effluent leakage from the nearby industrial lagoons.

Conclusions/Recommendations

In view of the above it is concluded that the Cavenham Forest Industries, Inc. forest products manufacturing complex can continue its operation in strict compliance with the Department of Ecology's guidelines, establishing a minimum level of treatment for effluent from log yards, and 40 CFR Part 429 - Timber Products Processing Point Source Category - in that there is no direct discharge of process wastewater into navigable waters (see listing of applicable effluent limitations on Pages 5 and 6).

It is also concluded that, because of the possible relationship that has been established between area groundwaters and the operation of the industrial wastewater lagoons, a continuation of the lagoon/groundwater monitoring program is necessary on minimum frequency of at least once every six (6) months for all parameters and once every three (3) months for temperature, pH, conductivity, color and static water level. At least one sampling per year for all parameters must be conducted during the period (considering mill operation and seasonal groundwater/weather conditions) that the industrial wastewater lagoon operation would be most likely to have a measurable impact on groundwater quantity and/or quality. Based on current records, this sampling should take place during August or September each year.

All parameters of the monitoring program include:

1. pH
2. Temperature
3. Conductivity
4. Color
5. Iron
6. Manganese
7. Tannin
8. Calcium and Magnesium
9. Total Organic Carbon

WDOE will be notified of each round of sampling with as much lead time as possible with a minimum notification of forty-eight hours (two normal working days).

Omak Creek is a seasonal stream in that it is usually dry, during a period of time each summer, upstream from the Crown Zellerbach millpond overflow. The condenser cooling discharge is about 80°F when discharged to the millpond. During an Okanogan River water quality survey conducted by the Department of Ecology on September 1st and 2nd of 1976, the water temperature of Omak Creek above and below the millpond overflow was:

September 1, 1976

Omak Creek Above Discharge	Omak Creek Below Discharge
67°F	77°F

September 2, 1976

Omak Creek Above Discharge	Omak Creek Below Discharge
63°F	77.8°F

During the period from 1970 through 1979 water quality data was collected at the two Okanogan River ambient water quality monitoring stations nearest to the mouth of Omak Creek. While this data does not include the most recent period of sampling at the Okanogan station it does represent the most recent period of sampling involving both the Okanogan and Janis stations. Data is available from the Okanogan station through 1985.

During the period of 1970 through 1979 water quality data on the Okanogan River at Janis (upstream from Omak Creek) shows a maximum value of 20.20°C (68.36°F), a minimum value of 0.30°C (32.54°F) and an arithmetic mean of 9.49°C (49.1°F). Water quality on the Okanogan River at Okanogan (below Omak Creek) shows a maximum value of 20.00°C (68.0°F), a minimum value of 0.50°C (32.9°F) and an arithmetic mean of 11.11°C (52.0°F).

The condenser cooling water discharge does at times constitute all or the majority of flow in Omak Creek resulting in the dramatic temperature increases of 10 and 14°F noted in September of 1976. While these dramatic temperature increases have been noted in Omak Creek (during summer low flow) it has not been concluded that this cooling water discharge has had a significant impact on the temperature of the Okanogan River. While ambient water quality data notes an increase of nearly 3°C between Janis (River Mile 52.3) and Okanogan (River Mile 26.0) the ambient temperature is well within the standard for Class A waters (18°C). Maximum values have exceeded the Class A standard both above and below Omak Creek with the highest value during this period being recorded above Omak Creek (Janis at 20.20°C as opposed to Okanogan at 20.0°C).

In view of the above it is recommended that the non-contact cooling water discharge into Omak Creek, as described herein, be allowed to continue subject to the following monitoring requirements:

> Cooling water monitoring shall be in accordance with the following schedule:

Parameter	Sample Point	Sample Type	Frequency
Temperature °F	Millpond overflow	Grab	Monthly
	Omak Creek Above	Grab	Monthly
	Omak Creek Near Mouth	Grab	Monthly
	Okanogan River Upstream	Grab	Monthly
	Okanogan River Downstream	Grab	Monthly
pH	Millpond Overflow	Grab	Quarterly
	Omak Creek Above	Grab	Quarterly
	Omak Creek Below	Grab	Quarterly
Flow	Millpond Overflow	Measure	Monthly
	Omak Creek Above	Measure	Monthly
	Omak Creek Below	Measure	Monthly

If the monitoring program outlined above identifies a significant impact on the water quality of the Okanogan River, exhibited as water quality standard violations, Cavenham Forest Industries, Inc. will immediately implement actions necessary to eliminate any standards violations and prevent their reoccurrence. Such actions will include effluent treatment to reduce temperature, flow reduction or both. Further, Cavenham Forest Industries, Inc. must continue to develop and implement a wastewater treatment or recycling system designed to ultimately eliminate the discharge of process wastewater and to reduce the flow and temperature of the non-contact cooling water discharge(s).

Permit Term

The term of the permit should be five (5) years expiring September, 1990.

Applicable Effluent Limitations

Process Wastewater Applicable Effluent Limitations

40 CFR	429.40 - 429.41 -	Subpart C: Plywood Subcategory There shall be no discharge of process wastewater pollutants into navigable waters. (BPT - BAT - NSPS)
40 CFR	429.120 - 429.121 -	Subpart K: Sawmills and Planing Mills Subcategory There shall be no discharge of process wastewater pollutants into navigable waters. (BPT - BAT - NSPS)
40 CFR	429.130 - 429.131 -	Subpart L: Finishing Subcategory There shall be no discharge of process wastewater pollutants into navigable waters. (BPT - BAT - NSPS)
40 CFR	429.100 -	Subpart I: Wet Storage Subcategory There shall be no debris discharged and the pH shall be within the range of 6.0 to 9.0. (BPT - BAT - NSPS, BCT - Reserved)

Department of Ecology Guideline - To establish a minimal level of treatment for effluent from log yards (Applicable to surface water discharges).

1. In accordance with 40 CFR Part 122.3(k), the discharge of runoff through a discrete conveyance (e.g., ditch, pipe, etc.) from a log yard to surface waters is a point source subject to the NPDES permit requirements.

2. There shall be no discharge of runoff water from wet decks during periods when water is applied to the logs.

3. During periods when water is not applied, runoff may be discharged following treatment as specified below only in an amount equal to the volume of precipitation falling on the area collected.

4. Effluent from truck or wheel washing shall be collected and treated in accordance with the policy on vehicle washing facilities, No. 8. Where a discharge from such facilities is to a common log yard drainage system, the effluent shall be recycled to the extent feasible for use in wet decking or other uses.

5. A minimum of primary treatment (settling pond without chemical treatment) will be given to effluent from all log yards.

6. If it is demonstrated that sedimentation alone consisting of a minimum of 12 hours detention is not adequate to meet water quality standards, longer detentions or a chemical addition will be required.

7. If a chemical addition is necessary, any chemicals or polyelectrolytes proposed for use must be demonstrated to be nontoxic.

8. Turbidity shall not violate the water quality standards outside the dilution zone (see WAC 173-201-045).

9. Settleable solids shall not exceed 0.1 ml/l as determined by the standard Imhoff cone test procedure.

10. Oil shall not average more than 10 mg/l with no single sample exceeding 15 mg/l. No visible sheen shall be present at anytime. The oil test normally used (petroleum ether extraction) takes up leachate from wood, therefore, the freon extraction technique will be used.

11. pH shall be within the range of 6.0 to 9.0.

12. Diking, ditching, sloping, and/or other means should be used as required to prevent uncontaminated water from entering the treatment facility, and to prevent contaminated runoff from entering surface waters without treatment.

13. A method/device shall be employed at the settling pond to prevent the discharge of floating matter from the pond.

14. Runoff collected from wet decking shall be recycled, following treatment if required.

15. Any deviation from this policy shall be supported by technical and/or economic justification.

DEFINITIONS: Wet deck means a log yard which involves the application of water to the logs.

Log yard means a permanent or semipermanent land-based facility used for storing, sorting, or shipping logs. Log yards may exist alone or in conjunction with other facilities used for processing or shipping logs. The term does not include landings or other temporary storage sites which are part of timber cutting or other silvicultural activities covered under the forest practices rules and regulations.

Non-contact Cooling Water Effluent Limitations

Parameter	Monthly Average Summer	Monthly Average Winter
Flow (gallons per day)	1,569,600	4,608,000
Temperature	80°F	80°F
pH	within the range of 6.5 to 8.5	

Process Wastewater Pond Influent Applicable Limitations

Parameter	Monthly Average Summer	Monthly Average Winter
Flow (gallons per day)	3,715,200	676,800
Temperature	90°F	90°F
pH	within the range of 6.0 to 9.0	

Chronology of Water Quality Standards Promulgation by EPA for the Confederated Tribes of the Colville Reservation

Summer and Fall of 1985	Discussion held with Region X staff and legal analysis initiated by Tribal attorney regarding CFR requirements.
02-04-86	Formal written request and supporting documents sent to R.A., Ernesta Barnes.
03-13-86	Memo to Larry Jensen AA for Water from R.A., Ernesta Barnes recommending promulgation.
09-09-86	Initial draft of Federal Regulations Notice prepared.
09-25-86	Meeting at HUD conference room on Reservation with Kent Ballantine and Dave Sabock from Headquarters regarding draft Federal Register language and other concerns.
11-03-86	Revised draft of Preamble prepared based upon September 25 meeting and Tribes' comments.
12-30-86	Headquarters latest draft of Preamble based upon Region X's comments to November 3 draft.
01-09-87	Another draft.
02-11-87	Letter to Rick Albright, Region X, from Tribal attorney suggesting minor changes and expressing Tribes approval.
04-20-87	New draft preamble completely changing previous agreed upon language - totally unexpected but presumably done to account for amendments to CWA.
05-11-87	Letter to Rick Albright from Tribal attorney expressing Tribes objections and requesting that previously agreed language be reinserted and reasons therefore.
07-14-87	Memo to W. Whittington Director, OWRS from R. Burd, Water Division Director, Region X supporting Tribes May 11, 1987 letter.
08-07-87	Tribal delegation meeting with R.A., Robie Russell to request assistance in getting stalled WQS package moving.
09-10-87	Latest draft issued by headquarters; requested language still not reinserted while other new language included; unresponsive to Tribes comments, requests and language mutually agreed upon approximately one year earlier.

09-18-87	Phone call with Rick Albright - Tribes capitulated in the interest of getting matter finalized and Federal Register Notice done.
07-15-88	Almost one year since the Tribes accepted Federal Regulation notice language the proposed rule finally published at 53 Federal Regulation 26968.
08-18-88	Public hearing held at Nespelem Community Center, Nespelem, Washington.
09-12-88	Colville Tribes comments on proposed rule.
09-13-88	Comment period closes.
10-14-88	Ninety (90) day deadline under CWA 303(c)(4) for administrator to promulgate proposed rule.
11-07-88	Ninety (90) days since public hearing see CWA 303(c)(4).
12-12-88	Ninety (90) days since comment period officially ended.
12-16-88	Tribal attorney calls Dave Sabock to see why final notice is not forthcoming since statutory deadline has elapsed.
01-89	Chairman of Colville Environmental Quality Commission calls Mr. Sabock.
01-27-89	CEQC directs tribal attorneys to explore legal remedies to force final promulgation.
03-10-89	Tribal delegation meets with headquarters staff (Martin Topper, Caren Rothstein and Bill Diamond) to organize reason for delay.
03-02-89	Tribes special counsel meets with Martha Prothro at conference in Dallas to encourage movement of stalled rule.
03-13-89	Tribal attorney called Bill Whittington to determine why final rule is not approved by headquarters yet.
05-02-89	Tribal attorney called Dave Sabock Red Border Review complete and regulations at OMB.
05-16-89	OMB released regulations.
05-17-89	Sent to Administrator William K. Reilly for approval.
06-13-89	Tribal attorney contacts OWRS for update on standards packet. Still no action by Reilly. Perhaps 2-3 weeks.

DARRELL WADENA, PRESIDENT
NORMAN DESCHAMPE, VICE PRESIDENT

GARY S. FRAZER, EXECUTIVE DIRECTOR
KENT P. TUPPER, LEGAL COUNSEL

EUGENE A. BOSHEY, SR., SECRETARY
DANIEL BROWN, TREASURER

The Minnesota Chippewa Tribe
P.O. BOX 217 — CASS LAKE, MINNESOTA 56633-0217

HOME LOAN
335-0502
ECONOMIC DEVELOPMENT
335-0503
EDUCATION
335-6584
HUMAN SERVICES
335-0505
WATER QUALITY
335-[illegible]

ADMINISTRATION
335-0501
TELEFAX
335-6562

STATEMENT OF DARRELL WADENA, PRESIDENT
THE MINNESOTA CHIPPEWA TRIBE
BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
REGARDING
THE IMPLEMENTATION OF INDIAN POLICY AND PROGRAMS
OF THE
ENVIRONMENTAL PROTECTION AGENCY

June 23, 1989

Mr. Chairman, and distinguished members of this Committee, I am Darrell Wadena, President of the Minnesota Chippewa Tribe. My thanks to this Committee for the opportunity to speak with you today.

I have come here to present to you my views regarding the implementation of the Indian Policy and Programs of the United States Environmental Protection Agency. I would like to begin by relating to you what it means for my Tribe to undertake a formal relationship with the EPA to protect Tribal environmental quality. The Chippewa waters, land, and air are invaluable. These resources represent the basis for our cultural and economic survival. For that reason, our ability to protect our resources may be equated with our ability to self-determine our future. I know from my communication with other Tribes across the United States that this is true for them as well.

The Minnesota Chippewa have had both good and not so good relations with the EPA over the last several years. I do not believe that the EPA staff has fully grasped the history of the Tribal/Federal relationship, as may be expected, since the Agency was only formed twenty years ago. There have been times when respect for Tribal Government appeared to be lacking within the EPA. I believe this was the result of a lack of understanding, and I welcome the opportunity for my government to work with this agency of the United States Government.

In 1984 the EPA wrote a very positive and eloquent Indian Policy. This was followed by amendments to the Safe Drinking Water Act and the Clean Water Act, both of which contained good Indian self-determination language. Through these amended laws, the United States Government reaffirmed Tribal jurisdiction over waters within their Reservations. Needless to say, some State governments were not overjoyed with the idea of competing with Tribes for a limited amount of EPA funding. The EPA seemed overwhelmed with the prospect of treating some 270 federally recognized Indian Tribes as States. Consequently, in the more than two years following the enactment of these federal environmental laws, little progress has been made toward Tribal environmental program development.

Tribes are being asked by the EPA to cooperate with States, in the implementation of these Federal environmental protection laws. I believe Tribal governments are willing to cooperate with State governments. However, I maintain that in order to cooperate, Tribes must first operate federally mandated environmental protection programs on par with the States. Toward that goal, the Minnesota Chippewa Tribe supports the proposed FY 1990 Appropriations Report Language to Implement the EPA American Indian Policy, which was recently presented to the Appropriations Subcommittee. I respectfully request that this Committee support this funding proposal; a copy of this proposal is included with my written testimony. Tribes need financial help to establish and maintain their environmental protection programs, as was afforded to States over the past twenty years.

Any EPA funding that is appropriated for Tribes needs to be dispersed from Washington in a manner that equitably addresses the needs in Indian Country. Items which must be factored into any disbursement formula include Reservation size, population, and water resources. Some EPA programs, such as sewage treatment construction grants, are directly related to population. The needs in other program areas depends on how many acres of lakes and miles of streams a Tribe has to protect, and their industrial base. The EPA needs to involve the Tribes in the development of a funding formula that addresses these needs. Funding from other federal sources, such as the Bureau of Indian Affairs, the Indian Health Service, and the Geologic Survey, should be coordinated through Tribes where such programs may be applicable or supplemental to those of the Environmental Protection Agency. The memorandum of understanding which currently exists between these agencies is good; however Tribal staff needs to be appraised of what these agencies are doing, if we are to assume our own environmental protection programs.

The most pressing item for the EPA to address is the need to accelerate the process whereby program development grants are made available to Tribes, and to get these programs in place. Once these programs are in place, the EPA must be committed to sustaining them. Currently, the EPA is urging Tribes to assume programs for which no funding is available, such as the Community Right to Know portion of the Superfund Reauthorization Act, knowing full well there is no staff in many Tribal governments to assume the workload. It would seem only common sense that the EPA would first ensure that environmental protection personnel are in place at the Tribal level. This would greatly enhance program success in meeting the goals of the law as Congress intended. As it is, by offering these programs to Tribes, the EPA gives the appearance of working with Tribes, and in many cases Tribes are not prepared to undertake the programs. Then it is the Tribes which are accused of being unconcerned about our environment. Nothing could be farther from the truth. Give us program development dollars as the states received, and we will protect our environment, and perhaps help the Federal government and States to better protect their environment as well.

I would like to conclude by saying that I have enclosed with my written testimony our comments on the EPA's FY 90 Draft Program Guidance. These comments express our need for an integrated program approach for EPA programs. Also enclosed is a copy of House Concurrent Resolution 331, passed by the 100th Congress in 1988. I appeal to this Committee to read this document again. Ask your colleagues to act in good faith when EPA appropriations for Tribes are considered.

Respectfully,

THE MINNESOTA CHIPPEWA TRIBE

Darrell Wadena
Darrell Wadena
President

PROPOSED FY 90 APPROPRIATIONS REPORT LANGUAGE TO IMPLEMENT THE EPA AMERICAN INDIAN POLICY

The Committee instructs the EPA to earmark appropriations to implement the EPA Indian Policy, with the goal of developing programs to protect reservation environments on a par with the rest of the nation. The Committee believes that a specifically identified commitment of Agency resources -- including significantly increased personnel, travel funds, technical assistance, and grants for tribal governments -- must be allocated to tribal needs and programs.

The Committee further instructs the EPA to report back to the Committee by April 1, 1990 on the progress made in staffing and restructuring EPA to address Indian issues, progress made in building tribal environmental program capability, progress made on special tribal projects, and progress made on assessment of tribal drinking water and wastewater treatement needs.

SALARIES AND EXPENSES

$2,880,000 and 48 FTE for the coordination and implementation of programs to protect the environment of federal Indian reservations. These FTE's should be divided equally between Headquarters and Regional Offices and include Indian Affairs Staff to report directly to the Administrator, Assistant Administrators and Regional Administrators.

ABATEMENT, CONTROL AND COMPLIANCE

"$25,000,000 for program development grants to American Indian tribes to assist tribes in protecting their environments, consistent with the EPA Indian Policy. In providing such assistance, EPA should emphasize development of a national infrastructure of tribal environmental offices to protect reservation environments in the same manner that the existing infrastructure of state offices has protected the nation's environment outside Indian reservations. This assistance should involve all EPA media programs. In providing such assistance to tribes, EPA should exercise flexibility in making multimedia and interdisciplinary grants to tribes, especially where this is appropriate to the small scale institutions found on many reservations.

$12,000,000 for special projects relating to specific areas of tribal environmental problems, to be funded at the Administrator's discretion. Of these funds, at least $5,000,000 should be used to fund tribal forestry- and fishery-related water quality studies, at least $2,500,000 for tribal groundwater studies, and at least $1,500,000 for tribal clean lakes projects.

The Committee also instructs the Administrator to undertake and complete by February 1991 a study to evaluate tribal needs as required to permit compliance of tribal drinking water and wastewater treatment facilities with minimum federal standards. The study of tribal wastewater treatment needs should use such criteria and format as are necessary to permit direct comparison with EPA's assessment of state wastewater treatment needs.

06/20/89 14:13 ☎ 218 335 2252 110 MINN CHIPPEWA TK ☎ 09

DARRELL WADENA, PRESIDENT
NORMAN DESCHAMPE, VICE PRESIDENT

GARY S. FRAZER, EXECUTIVE DIRECTOR
KENT P. TUPPER, LEGAL COUNSEL

EUGENE A. BOSHEY, SR., SECRETARY
DANIEL BROWN, TREASURER

The Minnesota Chippewa Tribe
P.O. BOX 217 — CASS LAKE, MINNESOTA 56633-0217

HOME LOAN
335-[illegible]
ECONOMIC DEVELOPMENT
335-[illegible]
EDUCATION
335-[illegible]
HUMAN SERVICES
335-[illegible]
WATER QUALITY
335-[illegible]

ADMINISTRATION
335-[illegible]
TELEFAX
335-[illegible]

Valdas Adamkus, Administrator
USEPA, Region 5
230 S. Dearborn St.
Chicago, IL 60604

Dear Mr. Adamkus:

The Minnesota Chippewa Tribe appreciates the opportunity to review and comment on the USEPA's FY-1990 Draft Program Guidance. While our expectations for Tribal program development may be greater than can be met by the EPA at this time, we are encouraged by the fact that this FY-90 guidance contains more language dealing with Tribes than did the FY-89 guidance.

The draft guidance for Water Division speaks to the integration of programs to improve water quality management efforts, p. 16 and 40. We have expressed this view several times regarding Tribal water quality program development. Tribal environmental protection will integreate pertinent water quality laws, under which the USEPA operates, into our Water Quality management plan. We would like to reiterate that for the Minnesota Chippewa Tribe, the Clean Water Act, Section 106 specifically, is the Federal law commensurate with our efforts. Other Federal legislation, e.g. RCRA, CERCLA, targets specific activities or agents as potential pollutants to be managed. At the heart of these and several other Federal environmental protection laws is water quality. We will integrate all pertinent activities involving all pertinent laws into our water quality management plan; we will also utilize all sources of relief to protect our environment. fight fires if you will, however a meaningful Tribal water quality program must begin at the beginning.

Our comments regarding solid waste are to again restate our position and suggestions for dealing with this problem on a national scale. The cradle to grave philosophy is good, but may need to be renamed. The implication to the public is that burying our wastes is an environmentally sound practice. Nothing could be farther from the truth. We have proposed in the past, and propose again, that a goal of cost internalization for goods produced be instituted. Product containers can be labelled as to their disposal consequence, e.g. compostable, toxic, etc., and a surcharge would be attached to environmentally unsafe containers. Consumers would then have the opportunity to make decisions regarding the solid waste problem at the beginning of the process; as it is now the only consumer input is attending public meetings to decide how, when, and where to put a new landfill or incinerator plant, the end of the solid waste process after there already is a problem.

Page 2, (Cont.)

Permitting consumers to review the environmental compatibility of product containers with reduced costs for the most compatible, will provide an incentive for industry to aid the public in reducing the environmentally degrading portion of the waste mass.

We strongly encourage EPA's efforts to refine and strengthen regulations for dealing with pesticides. Much of our effort here will be to monitor pesticide applications done by Federal, State, and local government forestry managers. This activity will likely be coordinated directly by a Tribal water quality management agency as that agency is developed. Here again, the effectiveness of this program may be at the mercy of CWA funds unless FIFRA program funds or alternative funding is available.

The Minnesota Chippewa Tribe has maintained large amounts of critical habitat for endangered species, a case in point is Leech Lake Reservation which contains the largest nesting population of bald eagles in the contiguous United States. This habitat has been and continues to be threatened by plans for new roads, hazardous waste facilities, and expeditious assistance from the EPA in getting our water quality management program to an operational stage that would permit us to meet these environmental challenges.

Sincerely,

THE MINNESOTA CHIPPEWA TRIBE

Gary S. Frazer
Executive Director

GSL:mlf

cc: Casey Ambutas
USEPA Chicago

III

100TH CONGRESS
2D SESSION

H. CON. RES. 331

IN THE SENATE OF THE UNITED STATES

OCTOBER 5 (legislative day, SEPTEMBER 26), 1988
Received and referred to the Select Committee on Indian Affairs

OCTOBER 21 (legislative day, OCTOBER 18), 1988
Committee discharged

CONCURRENT RESOLUTION

To acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.

Whereas the original framers of the Constitution, including, most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts of the Six Nations of the Iroquois Confederacy;

Whereas the confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself; and

Whereas, since the formation of the United States, the Congress has recognized the sovereign status of Indian tribes and has, through the exercise of powers reserved to the Federal Government in the Commerce Clause of the Constitution (art. I, s.2, cl. 3), dealt with Indian tribes on a government-to-government basis and has, through the treaty clause (art. II, s.2, cl. 2) entered into three hundred and seventy treaties with Indian tribal Nations;

Whereas, from the first treaty entered into with an Indian Nation, the treaty with the Delaware Indians of September 17, 1778, the Congress has assumed a trust responsibility and obligation to Indian tribes and their members;

Whereas this trust responsibility calls for Congress to "exercise the utmost good faith in dealings with Indians" as provided for in the Northwest Ordinance of 1787, (1 Stat. 50);

Whereas the judicial system of the United States has consistently recognized and reaffirmed this special relationship: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That—

(1) the Congress, on the occasion of the two hundredth anniversary of the signing of the United States Constitution, acknowledges the contribution made by the Iroquois Confederacy and other Indian Nations to the formation and development of the United States;

(2) the Congress also hereby reaffirms the constitutionally recognized government-to-government relationship with Indian tribes which has been the cornerstone of this Nation's official Indian policy;

(3) the Congress specifically acknowledges and reaffirms the trust responsibility and obligation of the United States Government to Indian tribes, including Alaska Natives, for their preservation, protection, and enhancement, including the provision of health, education, social, and economic assistance programs as necessary, and including the duty to assist tribes in their performance of governmental responsibility to provide for the social and economic well-being of their members and to preserve tribal cultural identity and heritage; and

(4) the Congress also acknowledges the need to exercise the utmost good faith in upholding its treaties with the various tribes, as the tribes understood them to be, and the duty of a great Nation to uphold its legal and moral obligations for the benefit of all of its citizens so that they and their posterity may also continue to enjoy the rights they have enshrined in the United States Constitution for time immemorial.

Passed the House of Representative October 4, 1988.

Attest: DONNALD K. ANDERSON,

Clerk.

STATEMENT OF

THE COUNCIL OF ENERGY RESOURCE TRIBES

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARINGS REGARDING ENVIRONMENTAL PROTECTION ON INDIAN LANDS

Washington, D.C.
June 23, 1989

by

A. David Lester
Executive Director
Council of Energy Resource Tribes

STATEMENT OF THE COUNCIL OF ENERGY RESOURCE TRIBES BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARINGS REGARDING ENVIRONMENTAL PROTECTION ON INDIAN LANDS

On behalf of the 43 federally recognized tribes that comprise the Council of Energy Resource Tribes, I want to thank the Chairman and this Committee for the interest and the leadership that the members and staff have shown in focusing attention on the critically important issue of environmental protection in Indian country.

The member tribes of the Council of Energy Resource Tribes (CERT) have been active and instrumental in this area for more than twenty years, and attention to these issues was among the first directions they gave to their CERT organization. It was one of the founding tribes of CERT, the Northern Cheyenne Tribe of Montana, that first went to court to establish the applicability of the National Environmental Protection Act (NEPA) of 1968 to Indian lands. The Northern Cheyenne Tribe also happens to be the first tribe in the country to petition successfully for the designation of the reservation airshed as a Class I air quality area.

The CERT tribes worked actively with this Committee and the Congress in developing the Surface Mining Control and Reclamation Act of 1977; the Indian Mineral Development Act of 1982; the Nuclear Waste Policy Act of 1982; the Safe Drinking Water Act Amendments of 1986; the Superfund Amendments and Reauthorization Act of 1986; and the Clean Water Act Amendments of 1987, to name a few of the important environmental statutes of recent years that reflect the special relationship that exists between the United States and her Indian tribes, and the role that these tribes play in the governance of America.

Although brought together organizationally largely in response to the energy crisis of the early 1970's, CERT's founding tribes made it clear from the outset that they would no longer sacrifice the habitability of their lands as a cost of their development to provide cheap sources of energy and power for distant markets. Accordingly, they have made environmental protection and the preservation of tribal governmental powers to ensure that protection a high priority of their CERT organization since its inception.

In 1978, CERT conducted an inventory of abandoned mine lands on Indian reservations, a study that resulted in the tribally controlled reclamation of a number of small abandoned mines on reservations throughout the Rocky Mountain region. CERT was also active in negotiations that led to the enactment of Section 701 of the Surface Mining Reclamation and Control Act (SMCRA), a provision that clearly contemplates eventual tribal primacy in the regulation of surface mining activity on Indian lands. We would like to take this opportunity to point out that the subsequent implementing legislation contemplated by Section 701 has still not been enacted, a dozen years after SMCRA became the law. The CERT tribes continue to urge the Administration to propose, and the Congress to enact, appropriate legislation that would provide this authority to tribes unequivocally. The CERT organization's technical staff have also conducted environmental assessments required under NEPA for proposed mineral development on a number of reservations. In the intervening years, the CERT tribes have made their technical staff available to conduct technical and scientific environmental work for a number of tribes that are not members of the CERT organization. To date, we have performed technical environmental work for 104 different tribes located throughout the length and breadth of the country. In each of these projects, tribal officials and staff have been intimately involved in every aspect of the work performed for them, from initial scoping through project planning, data collection, field work, and final report preparation. This work has included the establishment of tribal air quality monitoring programs; groundwater monitoring programs; water quality testing and monitoring; the planning and construction of solid waste disposal facilities; the development of tribal regulatory and enforcement codes; abandoned coal mine reclamation; negotiating settlement for reclamation of an abandoned uranium mine; needs surveys; septic system analysis; produced oil field brine disposal; leaking underground storage tank inventory; site characterization and geophysical analysis of the proposed permanent high-level nuclear waste repository at Hanford, Washington; evaluation of waste management practices; community planning and emergency preparedness for hazardous waste transportation; inventory and identification of hazardous waste sites affecting Indian lands; wastewater treatment plant capability analysis; and underground injection control program direction.

As early as 1981, the CERT tribes recognized the inadequacy of the federal environmental laws with respect to their effectiveness on Indian lands. They also recognized that, until the law reflected the role of tribal governments in the administration of these laws within the lands governed by the tribes, effective environmental protection would be largely denied to Indian country. This was almost necessarily so because most of these laws were written with the expectation that the principal responsibility for their administration would ultimately lie with the states, and the states generally do not possess either regulatory or any other jurisdiction to enforce these laws on Indian lands. The agency principally charged with ensuring federal compliance, the Environmental Protection Agency, is configured to reflect this primacy of the states and, hence, is not itself staffed or equipped to provide direct implementation of these laws on Indian lands. The result was that Indian lands were effectively denied effective environmental protection. Consequently, the CERT tribes, in concert with many other tribes throughout the nation, undertook an exercise of considerable political will to effect needed changes in the nations' environmental laws and policies.

The Environmental Protection Agency (EPA) itself must be given much credit for recognizing as well the regulatory void which existed on Indian lands during this time. After several years of effort and working in cooperation with organizations such as Americans for Indian Opportunity, the Native American Rights Fund, The National Tribal Chairmen's Association, the National Congress of American Indians, the Washington office of the Navajo Nation, and the Inter-tribal Council of Arizona, in 1984 EPA adopted a pair of initiatives that were stark in their simplicity and, yet, far-reaching in both scope and effect. In that year, the agency decided that it need not wait for specific legislation to begin to assist tribes in addressing their air quality needs since, after all, the Clean Air Act legislation was national in scope. EPA provided assistance to a number of tribes in Region VIII for the installation of air quality monitoring programs and underwrote a national environmental needs survey for Indian tribes. In addition, the agency contracted for a survey of hazardous waste sites threatening the environments of selected reservations throughout the country. These surveys were performed, respectively, by Americans for Indian Opportunity and the Council of Energy Resource Tribes, which also provided the technical work for the pilot air quality programs in Region VIII.

More profoundly, in 1984, EPA adopted its national "Indian Policy Statement," a seminal document that has since been held up as a model for other agencies throughout the Executive Branch of the government. In this policy statement, the agency recognized explicitly the need for extending the nation's environmental laws to Indian lands and further recognized that tribal governments are the appropriate units of government to assume the primary role of setting standards within federally established guidelines, making environmental policy decisions affecting their jurisdictions, and managing programs to accomplish effective environmental protection of Indian country.

To accomplish these objectives, EPA pledged itself to work with tribal governments on a "government-to-government basis," rather than as political or administrative subdivisions of other units of government. Recognizing that most tribes did not possess significant resources to address these issues, EPA also pledged to take affirmative steps to encourage and to assist tribes in assuming regulatory and program management responsibilities for reservation lands. The Agency committed itself to work with tribes in taking appropriate steps to remove existing legal and procedural barriers to the Agency's ability to work with tribes on this basis, and to encourage other federal agencies with specific responsibilities on Indian lands to support cooperative efforts designed to enable tribes to assume environmental protection responsibilities for their reservations. The policy statement also expressed a preference for cooperative intergovernmental approaches to environmental issues among tribal, state, and local governments.

Finally the 1984 Indian Policy Statement of EPA pledged to assure that tribal concerns are taken into consideration when Agency action has the potential of affecting reservation environments and committed the Agency to strive to assure compliance with national environmental laws on Indian lands. In order to accomplish all this, the EPA Indian Policy Statement concluded, the Agency would incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system, and its continuing policy and regulation development processes. This aspect of the policy has suffered as we discuss later.

Throughout this period from 1981 to 1986, the Indian initiatives of EPA were largely confined to the Office of Federal Activities under the Assistant Administrator for External Affairs and the Office of General Counsel. Although much dissatisfaction has been expressed with these offices in recent years, some of it by CERT tribes as well to be sure, I am confident that I speak for all tribes when I say that Indian country owes a great deal to the men and women in these offices whose leadership, insight into the nature of our national political fabric, and diligence brought about these innovations. At the sure risk of omitting others whose contributions were material, I nevertheless believe I would be remiss if I did not acknowledge publicly the contributions and leadership of Joy Wilson, Dick Sanderson, Anne Miller, Sadie Hoskie, and Leigh Price in these initiatives.

Much has been accomplished since the adoption of the Indian Policy Statement in 1984. Each Regional Office of EPA now has an Indian Coordinator, and invaluable institutional knowledge regarding the environmental issues confronting the reservations in each Region has been developed in these offices. Significant legislation has been amended to reflect the role of Indian tribes in the area of environmental protection, as discussed in the opening paragraphs of this statement. Indian tribes throughout the country are actively involved in such diverse environmental activities as the actual conduct of reclamation of what was once the world's largest open pit uranium mine; wastewater treatment plant operation for not only the tribe but also neighboring jurisdictions (Walker River, NV); groundwater monitoring conducted by tribes that has, in one instance, already resulted in the detection of a serious threat to the reservation town of Mission, SD (Rosebud, SD); the ownership and operation of an environmental laboratory that conducts water quality sampling and testing for other jurisdictions and businesses (Oneida, WI); contracting to perform fish pathology work for the state's water quality management of a major river (Penobscot, ME); air quality monitoring; and the negotiation of cooperative tribal-state regulation of underground injection of brine produced in oil and gas field operations (Southern Ute, CO); the development of solid waste disposal programs to serve both Indian and non-Indian residents (Fort Berthold, ND, and Cherokee, OK); and the regulation of pesticide application on agricultural lands (Fort Berthold, ND; and Fort Hall, ID). In their work regarding the proposed high-level nuclear waste repository on the Hanford Reservation in Washington, the Nez Perce and Umatilla Tribes mapped in the basalt formation which was to provide the storage reservoir a geological fault which was previously unknown to the Nuclear Regulatory Commission.

Indian tribes are very much a part of the environmental protection picture in America today. In much of rural America, Indian tribes offer the most promising potential for effective environmental protection for both Indians and non-Indians.

Much remains undone, however, and the record of EPA has not been so stellar in the implementation as it was in the articulation of its Indian Policy Statement. The spirit of that statement has yet to permeate the various program offices of the Agency. The Congress moved decisively and firmly in the earliest days of 1987 to enact into law the amendments to the Clean Water Act that President Reagan vetoed after the 99th Congress adjourned. Now, halfway through 1989, EPA has yet to promulgate final regulations to implement the Indian amendments to that important statute. In both the Safe Drinking Water Amendments Act and the Superfund Amendments and Reauthorization Act (SARA) of 1987, the Congress, recognizing that Indian lands had long been ignored, unequivocally directed that inventories be made of drinking water conditions and hazardous waste sites on Indian reservations. The Committee Report accompanying the Safe Drinking Water Act Amendments was explicit in expressing the concern of Congress that there was a disproportionate incidence of waterborne disease on Indian reservations, and the survey was directed for the purpose of informing Congress' deliberations on addressing that problem.

Both these inventories were conducted in a manner that, most charitably, can only be described as intellectually dishonest. We at CERT were particularly incensed when EPA contracted with a local firm to make extrapolations from the report we had prepared on hazardous waste sites on a few selected reservations and to conclude that, throughout Indian country, environmental problems resulting from the presence of hazardous waste sites is not sufficiently acute to require the dedication of significant resources for remedial actions. We do not believe that an honest reading of our report, which was designed and conducted as a preliminary survey, would support that conclusion even on the reservations we visited. I do not think we could ever be convinced that the report prepared to comply with SARA was not deliberately designed as a budget-saving document by the agency. Similarly, the report prepared in compliance with the Safe Drinking Water Act demonstrates little, if any, respect for Congress' concern with waterborne disease on Indian reservations. In communities where most of the population still lines up twice a week to buy bottled water that is trucked in, the Agency would have you believe that there is no problem because there is no "public water system," in the strict statutory definition of that term. Presumably, they would also have you believe that those Indians who do drink from contaminated wells because they cannot afford bottled water do not have any health problems as a result.

We cannot urge you strongly enough to give this matter your most serious attention. We believe we were better off when we all knew that we have a serious information gap than we are now when the Congress has been officially informed by the expert cognizant agency that there is no problem, especially if those reports were preconceived to reach a conclusion that is administratively convenient and budget-driven. Mistakes, even among experts, may be deplored but may also be discovered and corrected. Deceit and intellectual dishonesty, however, cannot coexist with trust in our institutions of government.

There is a tendency in all agencies of government to interpret laws in the manner that permits the agency's desired approach to implementation. In the case of recent Indian environmental amendments, the Agency is not equipped, staffed, or budgeted for substantial direct implementation by EPA personnel. Nor are most tribes presently equipped or staffed to assume primacy. In this regard, it should be noted that no state, for that matter, has assumed primacy for all programs administered by EPA. Only the Congress can address the issue of providing the Agency with the resources it needs to implement its own Policy Statement and the nation's laws. But the Congress can act appropriately only upon good information. If there is any way that this Committee can prevail upon the Agency to be forthright and candid regarding the true environmental needs on Indian reservations, I think I can assure you that tribes throughout the country will be willing and enthusiastic in their cooperation with both the political branches of government in addressing those needs.

We understand the problems of allocating limited resources to unlimited demands; we understand the principles of risk management; we understand that we are fortunate not to have environmental problems as pervasive and acute as those affecting other regions and communities of the country; and we understand that we, too, will have to make difficult choices and establish priorities in meeting the needs of our communities. We ask you to understand, too, however, that the principles of risk management mean little to the Indian parent who loses a child to an abandoned mine, or to repeated exposure to hazardous waste in an open pit, or to disease contracted from contaminated wells or surface springs.

The practices which have been adapted of minimizing the environmental needs of Indian country for purposes of administrative convenience or budget control, will be magnified in geometric proportion in the next few years unless the Congress arrests it now. For we believe that the Congress has concluded that there can be no effective national environmental program until the national laws embrace the nation. We represent a significant portion of the nation that has been left out until very recently, and even now, not all the laws have been amended to make specific provision for the role of tribal governments in an area where neither the states nor the federal government can effectively regulate. In other words, there can be no effective environmental protection for anybody until there is effective environmental protection for everybody. The environment cannot be protected along racial or political lines — or, as this country seems only now to be learning, even along national boundaries.

Unless the agency can demonstrate persuasively that the spirit as well as the letter of its own Indian Policy Statement will be observed in all the Agency's operations, the Congress may have to legislate that policy into law in order to provide the tribes with an enforceable tool.

The regulatory hoops which the Agency proposes to put tribes through in the process of seeking designation to be treated as a state, or in assuming primacy, are ridiculously cumbersome, intrusive, repetitive, and expensive. These procedures need to be greatly simplified, and perhaps the simplest way would be for the Agency to adopt as a policy a rebuttable presumption that a federally recognized Indian tribe does exercise significant governmental powers.

In the final analysis, effective environmental protection requires intergovernmental cooperation. The Agency has adapted a practice that is more likely to thwart such cooperation by pitting tribes against states in a zero-sum game for the allocation of its limited resources. On the one hand, EPA tells the Congress that no significant additional resources are needed to address problems on Indian lands because the problems are not significant, indicating that its resources are allocated on the basis of need. On the other hand, EPA tells tribes that the resources to be allocated for Indian problems are on the basis of percentage of land area or population.

In a meeting in our offices earlier this week between Western Governors and tribal leaders from throughout the West, it was abundantly clear that both the states and tribes realize that neither will have environmental protection until both do. The states and tribes are meeting together to discuss possible areas of cooperation, and EPA insists on meeting with each separately in order to maintain the monopoly of dividing the pie. The country can only pay dearly if this penchant for bureaucratic control is allowed to continue to substitute for political leadership at the federal level.

To take one example, suppose that the next significant spill of highly radioactive nuclear waste occurs when a bridge over a waterway fails on a road running through a reservation. The reservation may be small, and its people few. But to them, and to a large city immediately downstream, the need for effective emergency response will be great. If monies under Title III of SARA have been allocated based on land area or population, the chances for effective response will likely be none. These decisions, however, unlike those regarding program criteria are not made in open debate. They are served up by fiat, and in our opinion are driven not so much by honest assessment of need as by efforts not to offend existing constituencies, even though the law has visited significant new responsibilities on the Agency.

This is not to say that EPA's program offices are totally indifferent to environmental problems in Indian country. When it comes time to send a bill, they always seem to have the tribe's address, even when the problem was caused by or inherited from the Bureau of Indian Affairs (BIA) or the Indian Health Service (IHS). The Chippewa-Cree Tribe of Montana, for example, is facing a potential liability of some $1 million for containment of a hazardous waste site that the Agency has characterized as nationally significant. The entire site is hardly larger than this hearing room, and the hazard consists of pits that were used for dipping posts and poles into a preservative called pentachlorophenol, which is breaking down chemically and giving off dioxins that threaten groundwater and near-by water sources. This facility was constructed at the suggestion of, and with the encouragement of the BIA's forestry program as a means of making commercial use of small trees felled in forest thinning work. The Oglala Sioux Tribe of the Pine Ridge Reservation is facing substantial potential liability for allowing asbestos exposure from a school which the BIA constructed, abandoned, and turned over to the Tribe. We urge you to give this matter your attention and to ensure that tribes are not stuck with the bill for environmental liabilities incurred or instigated by their trustee.

We note, too, that unless effective environmental protection is brought to Indian country, the nation's entire policy of tribal self-determination and the development of reservation economies will be hamstrung. The investors of private capital are acutely aware today of the costs of environmental liability and the need to provide a safe workplace for their employees. If water quality, groundwater contamination, air quality, pesticide runoff, waste disposal facilities, and wastewater treatment, for example, are unknown ingredients in investment decisions, the risks are potentially disastrous and insurance is prohibitive. Throughout the country, environmental protection is not an aesthetic exercise; it is a measured investment in our nation's future. We urge this Committee to see that, unlike those made in bridges, dams, highways, irrigation systems, power plants, and airports, etc., this investment is not denied to Indian country. If this observation has merit, as we believe it does, then much of the agenda for the remainder of the Congress is clear. The Resource Conservation and Recovery Act; the Clean Air Act; and the Federal Insecticide, Fungicide, and Rodenticide Act are all likely to come before this Congress for reauthorization and amendment. These amendments should all provide the same prerogatives and opportunities for application to Indian country as were contained in the environmental legislation of the 99th and 100th Congresses.

In conclusion, we would like to offer one more observation and suggestion regarding the role of EPA in environmental protection in Indian country. In the early days of federal environmental legislation, as we have noted, the statutes were written in the contemplation that states would ultimately have the principal role in their enforcement and administration. During that time, EPA devoted enormous resources to providing funds and technical assistance to the states in the development of the capabilities to perform the role contemplated for them. In recent years, that function has been largely dismantled within the Agency, and its resources are directed more directly to actual implementation and program operation. The tribes have only begun to undertake the development of these capabilities and, in fact, have made progress at least comparable to that of the states within the first two years of states' authorities under federal law. And they have done this with incomparably fewer resources than were made available to the states. We suggest that the Committee give consideration to the need for concerted capacity building efforts, such as was provided to the states in the early days of these statutes. If environmental protection is an investment in the future, and not an expenditure in aesthetic consumerism, the cost will certainly be small compared to the alternative.

Once again, on behalf of the 43 member tribes of CERT, I express our deepest appreciation for the attention you are paying to these issues which are of critical importance to us. Whether our concerns have come to town, or whether you have joined us crying in the wilderness, we shall see. Thank you very much.

NATIONAL CONGRESS OF AMERICAN INDIANS
Est. 1944

EXECUTIVE DIRECTOR
Suzan Shown Harjo
Cheyenne & Creek Nations

EXECUTIVE COMMITTEE

PRESIDENT
John F. Gonzales
San Ildefonso Pueblo

FIRST VICE PRESIDENT
Gaiashkibos
Lac Courte Oreilles Chippewa

RECORDING SECRETARY
A. Gay Kingman
Cheyenne River Sioux Tribe

TREASURER
Buford L. Rolin
Poarch Band of Creeks

AREA VICE PRESIDENTS

ABERDEEN AREA
Wayne Ducheneaux
Cheyenne River Sioux Tribe

ALBUQUERQUE AREA
Stanley Paytiamo
Pueblo De Acoma

ANADARKO AREA
Edgar L. French
Delaware Tribe

BILLINGS AREA
Darrell L. Brown, Sr.
Northern Arapahoe Tribe

JUNEAU AREA
Will Mayo
Tanana Tribe

MINNEAPOLIS AREA
Hilary Waukau
Menominee Tribe

MUSKOGEE AREA
Harry F. Gilmore
Quapaw Tribe

NORTHEASTERN AREA
Loretta Crane
Seneca Nation

PHOENIX AREA
Harriet Toro
Tohono O'odham Nation

PORTLAND AREA
Joe De La Cruz
Quinault Nation

SACRAMENTO AREA
Dale Risling
Hoopa Valley Tribe

SOUTHEASTERN AREA
Billy Cypress
Miccosukee Tribe

STATEMENT OF SUZAN SHOWN HARJO, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS, ON THE ENVIRONMENTAL PROTECTION AGENCY INDIAN PROGRAMS BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, JUNE 23, 1989, WASHINGTON, D.C.

The National Congress of American Indians (NCAI), founded in 1944, is the oldest, largest and most representative national Indian organization. NCAI serves the needs of a broad membership of Indian and Native governments, organizations and people. On behalf of our membership, I would like to thank Chairman Inouye and Members of this Committee for the opportunity to appear before you today.

On May 23, a number of tribal leaders met with Environmental Protection Administrator William K. Reilly and other top EPA officials to discuss the relationship between Indian governments and EPA policy development and program administration. During the meeting, we expressed our concern over the inconsistencies in the various programs and their dealing with Indian tribes. The problem is one for which we all share blame.

EPA took the position early on that tribes were not specifically included in its mission and that Congress would have to provide specific statutory authority for EPA to work with tribes. Despite the positive statements in the 1984 EPA Indian Policy, we could not detect much willingness in the EPA program offices to fully serve tribes without congressional authorization and appropriation of funds, neither of which had be requested by EPA. Tribes then went to Congress for amendments to the individual statutes mandating EPA to work with the tribes as states under the Clean Water, Safe Drinking Water and Resource Conservation and Recovery Acts. However, now EPA has tended to use the specific inclusion of tribes in these statutes as further excuse for continued exclusion of tribes from most other programs rather than as a congressional trend to include tribes throughout EPA programs.

The NCAI Environmental Protection Committee has requested the new EPA administration to take the most liberal interpretation possible in its sincere efforts to work with Indian and Native peoples. We believe that this can be done by the EPA viewing itself as part of the federal Indian service under the 1934 Indian Reorganization Act, and not waiting for Congress to amend every statute to specify tribal programmatic inclusion. At the same time, we recommend that this Committee urge the Appropriations Committee to include language to accompany increased funding for tribal environmental programs to the effect that tribes are to be considered as included in all EPA programs on the same basis as states, unless the applicable statutes specifically exclude tribes. Additionally, we recommend

804 D STREET, N.E. • WASHINGTON, D.C. 20002 • (202) 546-9404

NATIONAL CONGRESS OF AMERICAN INDIANS
Est. 1944

EXECUTIVE DIRECTOR
Suzan Shown Harjo
Cheyenne & Creek Nations

EXECUTIVE COMMITTEE

PRESIDENT
John F. Gonzales
San Ildefonso Pueblo

FIRST VICE PRESIDENT
Gaiashkibos
Lac Courte Oreilles Chippewa

RECORDING SECRETARY
A. Gay Kingman
Cheyenne River Sioux Tribe

TREASURER
Buford L. Rolin
Poarch Band of Creeks

AREA VICE PRESIDENTS

ABERDEEN AREA
Wayne Ducheneaux
Cheyenne River Sioux Tribe

ALBUQUERQUE AREA
Stanley Paytiamo
Pueblo De Acoma

ANADARKO AREA
Edgar L. French
Delaware Tribe

BILLINGS AREA
Darrell L. Brown, Sr
Northern Arapahoe Tribe

JUNEAU AREA
Will Mayo
Tanana Tribe

MINNEAPOLIS AREA
Hilary Waukau
Menominee Tribe

MUSKOGEE AREA
Harry F. Gilmore
Quapaw Tribe

NORTHEASTERN AREA
Loretta Crane
Seneca Nation

PHOENIX AREA
Harriet Toro
Tohono O'odham Nation

PORTLAND AREA
Joe De La Cruz
Quinault Nation

SACRAMENTO AREA
Dale Risling
Hoopa Valley Tribe

SOUTHEASTERN AREA
Billy Cypress
Miccosukee Tribe

Statement by Suzan Shown Harjo, Executive Director
National Congress of American Indians
June 23, 1989
Page Two

clarifying legislation toward this same end, as well as a specific extension of the Indian Self-Determination Act coverage to EPA.

Congressional drafting inconsistencies along with EPA's over cautious interpretations of congressional intent, have resulted in today's EPA programs which are not consistent with or reflective of the government-to-government relationship which exists between the federal and tribal governments. For example, the language regarding Alaska Native and Oklahoma tribal governments has been inconsistent from statute to statute and, in some instances where the statute is silent, EPA has chosen to define the role. The Safe Drinking Water Act and Clean Water Act do not specifically address Alaska Native villages and EPA determined that the villages would not be eligible for these programs. Under the Superfund Amendments and Reauthorization Act, Alaska Native villages were expressly included as tribes, with regional and village corporations excluded.

Tribes are committed to protecting and improving their environments. However, federal agencies must recognized the years that they have ignored tribal environmental problems. Tribal authority to regulate their environments has finally been recognized, but with that recognition comes the mandated compliance to these environmental laws. We must be provided the time and assistance to reach compliance. EPA should practice extreme flexibility before taking enforcement actions against the tribes until they have received the technical assistance and funding to achieve compliance.

We have also seen a reluctance by some EPA regions and programs to fully include tribes in their planning or budgets. Tribal programs are often viewed as peripheral or optional rather than integral by some EPA staff. In order to truly integrate tribal programs, EPA must reorder its priorities and will need to reallocate funds from the states to the tribes.

Adequate funding to develop tribal environmental programs and technical assistance are two of the major concerns of tribal governments. If tribes are to replicate the federal/state environmental systems, many need additional monies and technical assistance for start up. There are several tribes which have the technical capability to

EXECUTIVE DIRECTOR
Suzan Shown Harjo
Cheyenne & Creek Nations

EXECUTIVE COMMITTEE

PRESIDENT
John F. Gonzales
San Ildefonso Pueblo

FIRST VICE PRESIDENT
Gaiashkibos
Lac Courte Oreilles Chippewa

RECORDING SECRETARY
A. Gay Kingman
Cheyenne River Sioux Tribe

TREASURER
Buford L. Rolin
Poarch Band of Creeks

AREA VICE PRESIDENTS

ABERDEEN AREA
Wayne Ducheneaux
Cheyenne River Sioux Tribe

ALBUQUERQUE AREA
Stanley Paytiamo
Pueblo De Acoma

ANADARKO AREA
Edgar L. French
Delaware Tribe

BILLINGS AREA
Darrell L. Brown, Sr.
Northern Arapahoe Tribe

JUNEAU AREA
Will Mayo
Tanana Tribe

MINNEAPOLIS AREA
Hilary Waukau
Menominee Tribe

MUSKOGEE AREA
Harry F. Gilmore
Quapaw Tribe

NORTHEASTERN AREA
Loretta Crane
Seneca Nation

PHOENIX AREA
Harriet Toro
Tohono O'odham Nation

PORTLAND AREA
Joe De La Cruz
Quinault Nation

SACRAMENTO AREA
Dale Risling
Hoopa Valley Tribe

SOUTHEASTERN AREA
Billy Cypress
Miccosukee Tribe

Statement by Susan Shown Harjo, Executive Director
National Congress of American Indians
June 23, 1989
Page Three

develop and operate these regulatory programs now; they simply need EPA to provide the funding necessary to obtain primacy. However, many tribes need planning monies which are not currently available. At this point, some tribes do not have the capability to conduct environmental assessments on their lands which would allow them to evaluate then select those EPA programs which best suit their individual needs.

The NCAI member tribes ask Congress to provide development funds for tribes to conduct deliberate and orderly needs assessments, prioritize these needs and develop management plans. There is no funding for such comprehensive planning available from EPA, the Bureau of Indian Affairs or the Indian Health Service. We ask that such a program be established, or that EPA consider various types of funding, such as block, consolidated or multi-media grants, which would allow tribes to combine funding from several sources to develop environmental programs. As it is now, with the limited and small amounts of funding available, a tribe may not be able to acquire enough funding from one source to hire even one staff person. By combining funds, it may be possible to hire at least one person to work on an environmental plan and evaluate the programs in which the tribe needs to participate. The planning monies should provide resources for travel to EPA training sessions and meetings.

The following specific actions have been recommended by the NCAI member tribes.

Clean Water Act - Construction Grants

Under Title II of the CWA, grants were provided to state and local governments for the constructing sewage treatment facilities. The 1987 Clean Water Act (CWA) Amendments established a grant program under Section 518(c) to provide this financial assistance to tribes and Alaska Native villages to plan, design and build wastewater treatment systems. In 1988, EPA provided its report to Congress on the wastewater treatment needs of Indian tribes, estimating the needs at $270 million in 1987.

However, the funds set aside are woefully inadequate and will be available for a limited time because the grant program is due to expire in favor of a revolving fund program for the states in FY1990, a program which does not

NATIONAL CONGRESS OF AMERICAN INDIANS
Est. 1944

EXECUTIVE DIRECTOR
Suzan Shown Harjo
Cheyenne & Creek Nations

EXECUTIVE COMMITTEE

PRESIDENT
John F. Gonzales
San Ildefonso Pueblo

FIRST VICE PRESIDENT
Gaiashkibos
Lac Courte Oreilles Chippewa

RECORDING SECRETARY
A. Gay Kingman
Cheyenne River Sioux Tribe

TREASURER
Buford L. Rolin
Poarch Band of Creeks

AREA VICE PRESIDENTS

ABERDEEN AREA
Wayne Ducheneaux
Cheyenne River Sioux Tribe

ALBUQUERQUE AREA
Stanley Paytiamo
Pueblo De Acoma

ANADARKO AREA
Edgar L. French
Delaware Tribe

BILLINGS AREA
Darrell L. Brown, Sr.
Northern Arapahoe Tribe

JUNEAU AREA
Will Mayo
Tanana Tribe

MINNEAPOLIS AREA
Hilary Waukau
Menominee Tribe

MUSKOGEE AREA
Harry F. Gilmore
Quapaw Tribe

NORTHEASTERN AREA
Loretta Crane
Seneca Nation

PHOENIX AREA
Harriet Toro
Tohono O'odham Nation

PORTLAND AREA
Joe De La Cruz
Quinault Nation

SACRAMENTO AREA
Dale Risling
Hoopa Valley Tribe

SOUTHEASTERN AREA
Billy Cypress
Miccosukee Tribe

include tribes. If the Indian set-aside were fully funded this year, it would represent only $28 million or 10% of the amount needed. This places Indian treatment systems at a serious disadvantage. We request that Congress provide tribes with the same opportunity given to the states since the 1970s and consider extending the section 518(c) to allow tribes another ten years of assistance to construct their wastewater treatment plants.

Resource Conservation and Recovery Act

In the Resource Conservation and Recovery Act (RCRA), Congress found that the problems of solid waste disposal have become a matter national in scope and concern, necessitating federal action. The new regulations for RCRA Subtitle Part D will force many landfills to be closed because they cannot meet the new requirements. It is uncertain how this will affect tribes. If they are required to comply, the effect could be devastating to tribes because they will not have the capability to bring their landfills up to code. Unlike the states, which received planning monies from EPA in the early 80s, tribes desperately need planning and construction monies.

Financial and technical assistance was made available to the states for the development, demonstration and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices. Although this assistance has never been provided to the tribes, courts have ruled that the tribes are responsible for providing solid waste facilities for their citizens under RCRA.

Title IV, subtitle D of RCRA sets the national standards for the management of solid waste, but is not authorized or responsible for the enforcing them. States are made solely responsible for implementing solid waste disposal programs and were originally granted funds to develop management plans. Since states have no jurisdiction over tribal lands and EPA has no enforcement authority, the only compliance mechanism for regulating waste on tribal lands is through citizen suits.

Section 1004 of RCRA defines tribes and Alaska Native villages as "municipalities." This categorization is contrary to the government to government relationship and is

EXECUTIVE DIRECTOR
Suzan Shown Harjo
Cheyenne & Creek Nations

EXECUTIVE COMMITTEE

PRESIDENT
John F. Gonzales
San Ildefonso Pueblo

FIRST VICE PRESIDENT
Gaiashkibos
Lac Courte Oreilles Chippewa

RECORDING SECRETARY
A. Gay Kingman
Cheyenne River Sioux Tribe

TREASURER
Buford L. Rolin
Poarch Band of Creeks

AREA VICE PRESIDENTS

ABERDEEN AREA
Wayne Ducheneaux
Cheyenne River Sioux Tribe

ALBUQUERQUE AREA
Stanley Paytiamo
Pueblo De Acoma

ANADARKO AREA
Edgar L. French
Delaware Tribe

BILLINGS AREA
Darrell L. Brown, Sr.
Northern Arapahoe Tribe

JUNEAU AREA
Will Mayo
Tanana Tribe

MINNEAPOLIS AREA
Hilary Waukau
Menominee Tribe

MUSKOGEE AREA
Harry F. Gilmore
Quapaw Tribe

NORTHEASTERN AREA
Loretta Crane
Seneca Nation

PHOENIX AREA
Harriet Toro
Tohono O'odham Nation

PORTLAND AREA
Joe De La Cruz
Quinault Nation

SACRAMENTO AREA
Dale Risling
Hoopa Valley Tribe

SOUTHEASTERN AREA
Billy Cypress
Miccosukee Tribe

**Statement by Suzan Shown Harjo, Executive Director
National Congress of American Indians
June 23, 1989
Page Five**

a statutory roadblock to tribal participation in RCRA. Tribes have only limited access to RCRA funds and ar low on state priority lists for assistance. We request that tribal amendments be included in the reauthorization of RCRA which emphasize that tribes be treated as equals to the states for the purposes of solid waste planning and regulation of the handling, transportation and storage and disposal of both solid and hazardous waste. And, that adequate funding and technical assistance to develop management plans be provided.

Tribes are very concerned about those hazardous waste sites which are not sufficiently damaging to the environment to be labeled Superfund sites. There exists no funding or assistance to clean them up and the Bureau of Indian Affairs has eliminated funds to provide what little was available for monitoring activities.

Superfund Amendments and Reauthorization Act

The Superfund Amendments and Reauthorization Act (SARA) provides for liability, compensation, cleanup and emergency response for hazardous substances released into the environment and for the cleanup of inactive hazardous waste disposal sites. In 1987 EPA submitted a report to Congress on hazardous waste sites on Indian lands. The study was criticized because it was not done "in consultation with Indian tribes" and because it was based on old reports done by the Bureau of Indian Affairs and Council of Energy Resource Tribes. Since then, EPA Regions V and VIII have undertaken regional surveys to determine hazardous sites on Indian lands -- surveys we feel should have been conducted by each region and submitted on a national basis. We ask that you urge EPA to require each region to undertake such a study.

Section III of SARA states that Indian tribe uses of the Hazardous Substance Response Fund include the cost of assessing both short-term and long-term injury to, destruction of or loss of any natural resources resulting from a release of a hazardous substance. However, an IRS Code Amendment prevents the use of the Fund for the costs of assessing both short-term and long-term injury, destruction or loss of natural resources. This amendment places an undue hardship on Indian tribes because tribes do not have the resources to conduct these assessments on their own. We request that Congress make provisions which will grant

NATIONAL CONGRESS OF AMERICAN INDIANS
Est. 1944

EXECUTIVE DIRECTOR
Suzan Shown Harjo
Cheyenne & Creek Nations

EXECUTIVE COMMITTEE

PRESIDENT
John F. Gonzales
San Ildefonso Pueblo

FIRST VICE PRESIDENT
Gaiashkibos
Lac Courte Oreilles Chippewa

RECORDING SECRETARY
A. Gay Kingman
Cheyenne River Sioux Tribe

TREASURER
Buford L. Rolin
Poarch Band of Creeks

AREA VICE PRESIDENTS

ABERDEEN AREA
Wayne Ducheneaux
Cheyenne River Sioux Tribe

ALBUQUERQUE AREA
Stanley Paytiamo
Pueblo De Acoma

ANADARKO AREA
Edgar L. French
Delaware Tribe

BILLINGS AREA
Darrell L. Brown, Sr.
Northern Arapahoe Tribe

JUNEAU AREA
Will Mayo
Tanana Tribe

MINNEAPOLIS AREA
Hilary Waukau
Menominee Tribe

MUSKOGEE AREA
Harry F. Gilmore
Quapaw Tribe

NORTHEASTERN AREA
Loretta Crane
Seneca Nation

PHOENIX AREA
Harriet Toro
Tohono O'odham Nation

PORTLAND AREA
Joe De La Cruz
Quinault Nation

SACRAMENTO AREA
Dale Risling
Hoopa Valley Tribe

SOUTHEASTERN AREA
Billy Cypress
Miccosukee Tribe

Statement by Susan Shown Harjo, Executive Director
National Congress of American Indians
June 23, 1989
Page Six

Indian tribes and Alaska Native villages the ability to access the Fund for the costs of assessments.

In order to participate in these EPA programs, tribes must apply to EPA for primary enforcement responsibility and are asked to establish their authority and capability. Once an application is filed, EPA will provide notice of the tribe's assertion of authority to the states for their response. Tribes are concerned that this process will delay funding of tribal programs where the states are unfriendly to the tribes. Within the new rules proposed by EPA, tribes want: to be given explicit opportunity to respond to any adverse comments from the states, to be provided the explicit right of appeal to the Administrator of any adverse determination made by the Regional Administrator and that a limit be placed on the amount of time the Regional Administration is allowed before making the determination.

In conclusion, I wish to stress the need for EPA and Congress to work closely with the tribal governments and to provide the opportunity for interaction, dialogue and participation necessary for us to protect the environment in Indian country.

804 D STREET, N.E. • WASHINGTON, D.C. 20002 • (202) 546-9404

19
TRIBES

INTER TRIBAL COUNCIL
of
ARIZONA

MEMBER TRIBES
AK-CHIN COMMUNITY
CAMP VERDE YAVAPAI APACHE
INDIAN COMMUNITY
COCOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT McDOWELL YAVAPAI TRIBE
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB-PAIUTE TRIBE
TOHONO O'ODHAM NATION
PASCUA YAQUI TRIBE
QUECHAN TRIBE
SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY
SAN CARLOS APACHE TRIBE
TONTO APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI PRESCOTT INDIAN TRIBE

TESTIMONY
presented by
The Inter Tribal Council of Arizona

on

The Implementation of the Indian Policy and Programs
of the
Environmental Protection Agency
Friday, June 23, 1989

Presented

by

Nora Garcia, First Vice-President
Inter Tribal Council of Arizona
Chairperson, Fort Mojave Tribe

4205 North 7th Avenue • Suite 200 • Phoenix, Arizona 85013 • (602) 248-0071

TESTIMONY OF THE INTER TRIBAL COUNCIL OF ARIZONA, INC. TO THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS OVERSIGHT HEARING OF THE ENVIRONMENTAL PROTECTION AGENCY

June 23, 1989

The Inter Tribal Council of Arizona (ITCA) sincerely appreciates the opportunity to present testimony to this Committee on the Environmental Protection Agency's (EPA) implementation of the Indian Policy and Agency programs. The nineteen tribes of the Inter Tribal Council of Arizona consider the quality of their environment to be of paramount importance. Preserving and restoring the environment is fundamental to tribal community and economic development as well as the health of community members. It is well known that improvements in delivering drinking water, treating waste water and managing waste resulted in much of the improvement in the health of Indian people over the last century. In addition, the Indian peoples in Arizona have a strong historical, cultural and religious relationship with our lands and our water.

ITCA has worked with EPA and tribes throughout the 1980's in developing environmental regulatory programs and providing information to tribal leadership and staff. ITCA has participated in the statutory and regulatory development process by attending meetings, submitting comments on draft documents, and maintaining regular contacts with EPA Headquarters and Regional staff. Through a contract with EPA Region IX, ITCA has provided administrative and technical assistance to tribes in Arizona in developing and administering pesticide regulatory programs since 1981.

I. GENERAL COMMENTS

Tribes in Arizona felt considerable hope with the passage of the Safe Drinking Water Act (SDWA), the Clean Water Act (CWA), and the Superfund Amendments and Reauthorization Act (SARA) amendments that the barriers preventing tribes from participating in the Nation's major efforts to deal with environmental problems would be removed. Unfortunately, the initial optimism was soon dissipated by the discussions and documents that EPA generated to implement these Amendments. Furthermore, the Agency's continued insistence on specific statutory language for tribal eligibility still leaves tribes without direct access to essentially all hazardous and solid waste management programs under the Resource Conservation and Recovery Act (RCRA). Many of the problems discussed in this testimony would have been obviated if the Agency had simply followed its Indian Policy and included tribes as eligible participants in its programs. Instead, states have had years to develop programs to protect the environment while tribes have been left out. This lack of participation is especially critical because the largest funding to environmental programs occurred during the time when EPA did not include Tribes in its programs. Now tribes are being expected to develop programs and to regulate based, in many cases, on small set-asides of what are State 'maintenance' programs, not percentages of the larger funds provided to the States to develop their programs over many years. When states developed their programs in the 1970's, EPA provided the necessary resources for consultation in developing programs. EPA legal and program staff met, on site, with state personnel to develop program plans and prepare proposals. Tribes have received minimal assistance from EPA to this point and the regulatory process is more burdensome and inconsistent than it was for States.

There are still discriminatory and needless administrative barriers to tribal participation in almost every program. These problems may get worked out as the Agency gains more experience in working with tribes. However, Agency activities in implementing the Indian Amendments suggest that the relationship between tribes and EPA will become more strained. Agency actions have complicated rather than facilitated tribal participation in programs. The cost of these complications are impaired health of Indian people and degradation of reservation lands and resources. Some tribal lands have almost pristine environmental quality; these rare resources need to be protected. On the other hand, many tribes face severe environmental problems, exacerbated by the lack of enforcement resources. The lack of regulation has made reservations a target of 'midnight dumpers' and environmentally damaging industries. The greater the disparity between tribal and state enforcement resources, the worse the situation will become.

Congress needs to provide clear leadership and require EPA to actively implement its Indian Policy and the Indian Amendments to the SDWA and CWA. To eliminate the bureaucratic barriers being put into place by the Agency, Congress needs to directly intervene in the implementation of the Amendments to the SDWA and CWA.

II. TREATMENT AS A STATE

EPA has developed a process referred to as 'treatment as a State' to implement the Indian Amendments to the SDWA and CWA. EPA documents state that the 'Treatment as a State' process is intended to meet the statutory requirements that, to be funded, tribes must be federally recognized, have the authority and be reasonably capable to run programs. However, this process has become a major stumbling block to tribal participation. The process requires tribes to send in narrative statements and supporting documents about the organization of tribal government, programs run by the tribe, the financial management and accounting procedures as well as statements showing existing (or plans for developing) capability to run environmental programs. Despite tribal objections, the process has become, with some minor exceptions, more detailed and burdensome since its inception. ITCA does not feel that it was the purpose of the

Congress in passing the SDWA and CWA Amendments to narrow the body of tribal powers which have been recognized by the courts. We feel that EPA needs to presume that tribes have the authority for environmental regulation unless clear evidence to the contrary can be presented. Tribal regulatory authority is inherent and can only be taken away by specific action of Congress. Inherent Right is a basic concept of Indian law and has been established by a long history of adjudications. The 'treatment as a State' process has become a test of tribal authority as governments. States differ in their administrative capabilities, their track records in environmental regulation and the number of acres over which they have jurisdiction. Nevertheless, EPA does not establish 'tests' of their authority as governments.

The 'treatment as a State' process is discriminatory because States were not required to undergo the same 'tests' when EPA turned over SDWA regulatory programs to them. EPA was eager to shed its regulatory burden and little was initially required of States before assuming these programs. However, EPA wrote in the SDWA tribal regulation drafts that the Agency anticipated that approximately 8 tribes nationwide would be interested in the the Public Water Supply Supervisory programs. The alternative is for EPA to run regulatory programs for tribes. In the past, these EPA programs have been poorly funded and understaffed. They are also handled long distance from Regional offices. Not only does this attitude conflict directly with the EPA Indian policy which calls for tribes to participate actively in regulatory programs, it is inconsistent with the concept that regulation is often best handled at the most immediate level.

Although some tribes may prefer EPA regulation for drinking water programs tribes are justifiably wary of federal agencies that feel they can regulate or administer programs better than tribes themselves. These kinds of policies have been major barriers, historically, to tribal government development. Tribes need to participate in programs directly to become true partners of the federal government and states in protecting the environment. Congress did not indicate through the Amendments that only large tribes are to be treated as States, or only the tribes with which EPA feels comfortable. The only non-discriminatory approach in the regulations would be for EPA to address those areas in which tribes are legally or historically different from States (such as criminal jurisdiction or historical lack of access to funds) and then require a parallel process to that required of States.

Our work with tribes in Arizona indicates that they have a keen sense of the obligations under water programs. ITCA sees no reason that a tribe would seek to participate in SDWA or CWA programs without a major commitment to public health and water quality; it is too expensive in financial and political terms to proceed otherwise.

Much of the difficulty with the 'treatment as a State' process seems to stem from basic lack of knowledge by EPA staff of tribal governments. Almost all tribes administer some federal or other contracts. The EPA regulations allude to this fact but then treat it as if this is only part of what would 'prove' tribal administrative capabilities. Yet many tribes have long track records of successfully meeting the requirements of other federal agencies such as the Departments of Housing and Urban Development, Health and Human Services and Interior. ITCA acknowledges that there will be a learning curve for EPA staff who have never had experience in dealing with Indian tribes. However, it is immensely frustrating that the Agency has retained these discriminatory requirements in a regulatory development process that has taken two years. The frustration is made more acute because EPA could easily have borrowed models from other Agencies that work with tribes. EPA has really reinvented an outdated wheel and taken two years to do it.

Pesticide Program Model

EPA could have turned to its own pesticide program for a reasonable model of tribal program development. EPA requires tribes to submit the same information as States for pesticide regulatory programs developed under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). These tribal programs have been operating successfully for eight years in Region IX. Tribes and States prepare a Priority Plan for implementing a pesticide regulatory program. In the Plans, tribes include portions of their Constitutions and By-laws. Tribes in the program, develop ordinances or codes for regulating pesticide use on tribal lands. Tribes have the option of making their regulations more stringent than federal laws. In Arizona at least one tribe has regulations that are more stringent. The Plan also details the process by which tribes will implement a pesticide regulatory program, including staff. The Plan is essentially a proposal for each Fiscal Year. This process has worked well for States as well as large and small tribes. It has worked for tribes that had existing environmental programs and for tribes that had little or no experience in administering regulatory programs.

Jurisdictional Review by Other Governments

As part of the 'treatment as a State' process EPA submits tribal 'claims of jurisdiction' over lands and resources to potentially interested other governments (presumably States in most cases). Although there are regulatory deadlines for when the Agency must submit the paperwork to other governments and when the other governments must respond, there are no deadlines for when any conflicts must be resolved. Under SDWA regulations, any disputed water systems will be kept out of a tribal program along with a proportionate amount of funds for regulating those systems until the conflict is settled. Under the CWA regulations entire programs can be held back by any jurisdictional conflicts. If a state government challenges a tribal jurisdiction, the Administrator will consult with the Secretary of the Interior to validate the tribal claims. The regulations provide no express legal standard for evaluating the claims. It is our understanding that State jurisdictional claims are reviewed by EPA legal counsel. If States review tribal claims, then EPA needs to solicit tribal review of state applications and the same procedure used for resolving conflicts. In fact, tribes are very concerned that states may use tribal populations, land, or other tribal resources as part of their applications or that they are incorporated into funding formulas for State programs, perhaps inadvertently.

As the regulations are currently written, EPA could find itself in the position of trying to resolve complex jurisdictional issues that are under litigation. In other cases, tribal applications could be held up indefinitely by 'nuisance' arguments by other governments. EPA needs to provide tentative approval to tribal applications under both SDWA and CWA in cases of jurisdictional questions. Tribes need to be funded to begin programs while conflicts are being resolved. The temptation to hold up tribal applications is made worse by the regulatory option for EPA to reallocate unused funds for tribal programs to states under the SDWA. Last year, funds originally allocated to tribal programs were 'reallocated' to the State of Arizona by Region IX. The regulations allow EPA regions the discretion to reallocate tribal funds to states. This discretion encourages EPA staff who have long-term relationships with state programs to view tribal program dollars as a potential source of funds for State programs. In addition, reallocation of the small level of funding for tribes suggests that EPA is not working effectively in developing tribal programs.

Confusion of 'Treatment as a State' and Program Applications

As part of the 'treatment as a State' application tribes are required to demonstrate existing capability or submit a plan for developing capability. The programmatic proposal is the appropriate place for EPA to require tribes to demonstrate how they will develop the regulations, staff and whatever else is needed to manage water quality. As tribes have not had funding in the past to develop capabilities in this area, the first years of most programs will necessarily involve the development of capability and expertise.

The problems of confusing specific program criteria and 'treatment as a State' shows most egregiously in the requirement that tribes submit separate 'treatment as a State' information for each program. The entire delay could be avoided if the 'capability ' and program development areas had been kept separate.

Alternative Approach

Congress needs to require EPA to streamline the specific requirements for 'treatment as a State'. The statutory requirements would be more than satisfied by a tribal demonstration that it:

- is federally recognized
- currently meets the requirements of the Single Agency Audit
- has good standing in running other federal programs.

III. REGULATIONS DEVELOPMENT PROCESS DELAY

It is particularly frustrating that these burdensome regulations, both for tribes and EPA staff, took so long to be made final. Although the SDWA Amendments were passed in June 1986 the regulations for tribal programs were not published until August of 1988 (six months after the statutory deadline). The CWA regulations took even longer and did not even go through the usual regulatory development process - the regulations are classified as 'interim final' and did not get published in draft form for formal comment. In addition, much of the CWA regulations deal with the 'treatment as a State' process which is almost identical to that developed for the SDWA programs almost a year earlier. The delay in promulgating these regulations is critical because EPA would not pass through funds to tribes until the regulations were in place. The decision was particularly hard to understand because EPA has provided funds to some tribes without Amendments or regulations in the past.

IV. REGIONAL INCONSISTENCIES AND PROBLEMS WITH REGION IX

There is little consistency between the Regions in interpreting the regulations. Region IX is requiring considerably more written material and legal explanations than Region VIII. At this time EPA staff in Region IX are requiring specific references to water resources in tribal constitutions as a demonstration of tribal regulatory authority. However, few tribal constitutions specifically refer to water resources because the right to regulate is inherent. These regional differences as well as differences in levels of resources and flexibility of approaches in working with tribes seem to stem, in part, from varying mandates from Regional Administrators, as well as attitudes and knowledge of program staff of Indian governments.

In Region IX, the pesticide program staff have been very responsive to tribes, water quality management is also developing a good working relationship with tribes. Drinking water has specific staff who have come a long way in the past five years in working directly with tribes. Construction grants and water quality standards work with tribes has been almost non-existent.

Although Region IX has more tribal resources within its area, regional representation on the national workgroups developing the regulations was minimal or non-existent for construction grants and water quality standard setting. Last year EPA funded a few construction grant projects nationwide before the regulations were made final. Region IX construction grants staff were not going to recommend any projects because they were unaware of any tribes that needed facilities. Timely interception by the new Indian Coordinator, a recently expanded full-time position, forced a last minute reconsideration of the issue.

In Region IX, ITCA has done the bulk of the work in getting information out to tribes on the CWA and SDWA Amendments. Region IX has provided little on-site technical assistance to tribes at this critical time.

V. CONSTRUCTION GRANTS

Congress specifically required EPA through the CWA Amendments to develop a process for directly funding tribes for construction of waste water treatment facilities. After a two year regulatory development process, EPA has set a deadline of 60 days to submit proposals for this year's funds. Tribes need adequate time at least 120 days to develop and submit proposals in the future. ~~to submit proposals for this year's funds.~~ Furthermore, if the program phases out in 1990 there will be substantial remaining unmet need on tribal lands for waste water treatment facilities. As tribes have not fairly participated in the programs in the past, it is discriminatory to end the program at the same time as States. Congress needs to extend the tribal construction grant program at least until FY 2000.

Role of the Indian Health Service

The Indian Health Service (IHS) has substantial expertise in wastewater facility design and construction on Indian lands. Major efforts, such as the Construction Grants program need to include IHS as a major participant. However, if tribes are to develop their capacity to monitor, regulate and protect the environment, decreasing emphasis will need to be placed on IHS by EPA. EPA will need to work more directly with tribes. Establishing direct relationships with tribes will require additional staff and travel resources.

EPA does not have a strong presence among tribes because so often in the past, EPA has worked through IHS. This poor identification results in continued problems at the tribal level in sorting out the regulatory functions of EPA and the public health functions of IHS.

VI. WATER QUALITY STANDARDS

EPA has not yet promulgated final regulations for tribal water quality standard setting and dispute resolution. However, the draft regulations demonstrate the same lack of understanding of tribal authorities as with the water quality management programs. Tribes, like States, have inherent authority to set their own water quality standards as long as they are as stringent as federal standards.

ITCA is concerned that during the conflict resolution process the generally greater level of development of non-tribal lands will weigh heavily in decision making. EPA needs to establish some criteria that ensures tribal economic and cultural needs will be given equal weight to non-tribal economic needs. States will be able to bring much greater political pressure than tribes to the dispute resolution process. Procedures or criteria that assist in making the process less accessible to political factors are critical.

The draft regulations suggest that EPA will seek the easiest solution for the Agency by pressuring tribes to adopt existing State water quality standards. However, state standards may not be appropriate for tribes. Tribes need the same resources as the states received to undertake complete assessments of water quality standards.

VII. HAZARDOUS AND SOLID WASTE

EPA is waiting for specific Congressional mandate to allow tribes to participate directly in RCRA programs. As a result, EPA has not provided funds to tribes in Arizona, such as the Gila River Indian Community, that are having serious problems with illegal dumping of hazardous wastes. Gila River has had to pay for the clean up of several illegal hazardous waste dumps which did not quality for Superfund dollars. Yet the tribe is not eligible for programs funds that would assist in managing the problem. As Arizona has no hazardous waste site, tribal lands have become a haven for illegal dumping.

VIII. FUNDING

In Arizona, Indian lands comprise 28% of the State and tribal governments have regulatory authority over these lands. The EPA Indian policy promised to address the lack of program coverage for Indian lands in 1984. In 1986 and 1987 the Amendments to the SDWA and CWA provided specific mandate from Congress for EPA to work with tribes. However, the Agency has committed no more than minimal staff and funds towards implementation either its Indian Policy or its Congressional mandate on Indian lands. There has been an almost complete lack of on-site technical assistance to tribes in developing environmental programs. Since the EPA Indian Policy was published EPA has not requested any additional funds from Congress to implement environmental programming for Indian lands.

EPA's annual appropriation is intended to protect the environment of the entire nation, and an equitable proportion of its staff and program funds should be dedicated to the protection of reservation lands. Despite this goal and the requirements of the new Amendments, tribal lands have been overwhelmingly left out of EPA planning and programming. This systematic failure is discriminatory and threatens the environmental quality of Indian reservations.

At a minimum twenty-five million dollars for FY 90 will be needed to begin development of an infrastructure of tribal environmental offices comparable to offices developed by States with EPA funds. Although tribal offices will generally be much smaller in scale than state offices, there should be some environmental regulatory capacity on most reservations. For many tribes, an environmental office may consist of one or two persons cross-trained in each of the media. These staff can coordinate with their EPA and state counterparts, advise the tribal council, and carry out inspections and monitoring activities to safeguard the reservation environment. For a few large tribes, the tribal environmental presence may resemble a state program in size and scope.

EPA has chosen in almost every case to set-aside less than the authorized amounts for tribes. The Agency has set-aside only 1 and 1/2 % of the overall funds for FY 88 and 89 for tribal water quality management programs, although Agency rules authorize up to 3%. Water quality management needs are some of the most critical to tribes, particularly in Arizona. The Agency has no justification for not setting aside the full amount at this important initial stage when tribal programs need funds for program start-up costs.

In addition, EPA must commit adequate staff, both at EPA Headquarters and in the Regional Offices, to ensure that all Agency activities impacting reservations are carried out consistent with the EPA Indian Policy. We estimate that adequate staffing for the immediate term will include, at a minimum, 36 new people responsible solely for Indian issues. These staff must also have adequate funding for travel to reservations to meet with tribal staff. The additional staff are not intended to replace existing technical and professional staff who need to continue to meet their responsibilities by working with tribes. As tribal programs develop, the number of technical staff will also need to increase.

Thank you for this time to present our comments on these critical areas of Indian Environmental Quality.

My name is Julie Andersen. I am on the Native American Sites Committee, a national committee of the Sierra Club. The Sierra Club is a national conservation organization that represents 500,000 people. I am submitting testimony on the behalf of the Sierra Club and in cooperation with the Oglala Sioux Tribal Health Authority at the Pine Ridge Reservation.

The Oglala Sioux at Pine Ridge have a serious drinking water problem due to the presence of uranium, radium, and heavy metals.

Uranium causes kidney disease and damages cardiovascular, endocrine, hematopoietic and immune systems. The National Academy of Sciences set a "Suggested No Adverse Response Level" of 35 micrograms or 11.6 picocuries per liter; there is no legal standard. According to a public water system water quality analysis done by the Rural Colition, a reading taken at well in Pine Ridge was 11 picocuries per liter. The highest reading is at the nearby community of Oglala; with a reading of 22 picocuries per liter. (See Exhibit A)

The source of this uranium contamination may be due to the many different mining activities in the area in and near the Reservation. The Tennessee Valley Authority mined in Edgemont, South Dakota in 1956 and left a tailings pile 123 acres. (See Exhibit B) Mining also took place in Chadrun and in Crawford, Nebraska. Also, some of the uranium found in aquifers may be due to the presence of naturally occurring volcanic ash.

According to water testing done by the South Dakota Deptartment of Water and Natural Resources (see Exhibit C) and corresponding health statistics (see Exhibit D) one community, the amount of radium twice exceeds South Dakota's 1971 standard for radium. In another community, the amount of iron is more than twenty times the standard. Such levels would doubtless correlate with the health statistics for the area. Cancer mortality rates have increased overall from 86.9 per 100,000 in 1920-24 to 188.1 in 1982. Diseases of the heart have increased from 169.8 in 1920-24 to 327.8 in 1982. (See Exhibit D.)

I was invited to the Reservation in February of this year by a staff member of the Oglala Tribal Health Authority. My visit there convinced me that there is good reason to suspect high levels of toxic contamination. For example, a leak in the tower holding drinking water for the community of Wanblee created an ice formation that was a bright blue. (See Exhibit E.) This color would indicate a high level of copper. Additionally, tribal members told me that the water at Red Shirt Table was red at certain times of the year. Red is an indicator of iron in the water. According to the Tribal Health Authority, Red Shirt Table is also where there have been a high number of infant deaths due to cancer and heart disease. Iron is acutely toxic to infants.

Additional sources of toxics on Pine Ridge may include contamination from the destruction of chemicals and ordnance materials at the Gunnery range on the northern part of the

Reservation. There was also some PCB spills at Kyle, Martin and Shannon, according to data from the EPA's list of spills reported from 1/75-3/86. (Courtesy of the Rural Coalition report).

We personally observed a toxic waste barrel being used to support a mailbox. (See Exhibit E.) There has been instances of 'midnight dumping' at other reservations, but it is unclear where the barrel came from or what its contents might be.

Whatever the source of contamination, interviews with families on the reservation disclosed a high number of cancer cases and other diseases. In the Bearstops family, the grandmother was diagnosed as having cancer, one daughter was diagnosed as having a brain tumor and breast cancer, and one grandchild required open-heart surgery. In the Quiver family, one grandmother has cancer of the mouth (she neither smokes or chews tobacco) and her son has cancer. Such cases are not unusual in Wanblee, where these families live, nor is it uncommon in Pine Ridge as a whole. It is unimaginable what strains such a high occurrence of disease places on these families.

At the request of the Tribal Authority, I discussed what I had seen with the Region 8 office of the EPA. I took the exhibits mentioned in this testimony to a meeting at EPA with Superfund staff. During the meeting, they advised me that Superfund was "biased" against rural populations because of the low numbers of people. They said the process of studying and listing a site was time-consuming and they declined to test the water or investigate it further. Instead, they referred me to the Water Programs staff.

A staff member in that program told me that under the Safe Drinking Water Act, the tribe was required to test the water and report the results to EPA because it operates the facility. In fact, the Tribe had not sent such results since 1980, although EPA hopes they will send some results this Spring. I commented that since the community and county of Pine Ridge is the poorest in the nation that it seemed probable they did not have the resources to test or upgrade their facilities as required by the Act. The staff member acknowledged that this might be the case. He said they did not intend to sample the water themselves. He referred me to the Indian Coordinator for EPA programs.

After discussing the issue in depth, she advised me that EPA as a regulatory agency was not equipped to deal with such an instance and that it was unlikely that EPA could do much to remedy the situation. Given the urgency and the immediate nature of the problem, I asked if there were anything else the Agency could do with regards to testing the water, or providing the tribe with interim supplies of drinking water or any other action. I was told that there was no money available for such activities.

Under Superfund, the EPA was required to submit a report to Congress providing an inventory of possible sites on the 278 reservations in the U.S.. (Under Sec. 126 added by PL 99-499 of

SARA.) In response, the EPA submitted a report that covered 25 of the 278 Indian reservations and was based on material from an older report that was compiled before Superfund was reauthorized. I met with Winston Porter last year and discussed with him and his staff whether the survey would be completed. They told me that they were "done counting sites" and that the survey would not be completed. I asked them what recourse a tribe had if they suspected they had a site. Porter's staff told me they could call their regional office of EPA. My own personal experience indicates that this is not a successful policy with regards to identifying new sites.

The Sioux and other tribes are entitled to the same protections under environmental law as are any other group in the United States. The lack of inquiry and response by the Environmental Protection Agency is a direct violation of Superfund and reflects a serious disregard for the Agency's mission of protecting health and the environment. Incidences such as the uranium contamination at Pine Ridge are not unique to one reservation. Throughout the West, other tribes have problems with the legacy of uranium mining. It is the responsibility of the EPA to discover the extent of the contamination and assist in remedying it. The EPA's behavior thus far would not have been considered acceptable by the residents of Love Canal, nor is it acceptable now to indigeneous peoples and other environmentalists in this Country.

Groundwater Quality for Nine Reservations in South Dakota

By Deborah Rogers and
Mary Lee Johns (chapter four)

Published by the Rural Coalition, Washington, D.C.

PUBLIC WATER SYSTEM WATER QUALITY ANALYSIS

Community Name: Oglala Tribal x Nontribal ___

Water Sources: 5 wells Well Depths: 80,135,200,91,95'

Well Ages: 69, 71, 75, 80, 81 Data references: G3, G9, G10

Dates Tested: Radioactivity 1980 Inorganics 1981, 81 (twice?) Common Parameters 1980, 81

PARAMETERS	MCL*	Needs Test (1)	Not a Health Concern (2)	Not a Health Concern (3)	Possible Concern (4)	Possible Concern (5)	Serious Health Concern (6)	Serious Health Concern (7)	value
Radioactivity									
gross alpha***	15 pCi/l	c						x	between 16 - 52
gross radium	--								
radium-226,228	5 pCi/l		x						
uranium	--	c					x		3 - 22 pCi/l; 24 - 55 ug/l
gross beta	4 mr/yr		x						
Inorganics									
arsenic	50 ppb		x						
barium	1 ppm		x						
cadmium	10 ppb		x						
chromium	50 ppb		x						
lead	50 ppb		x						
mercury	2 ppb		x						
nitrate	10 ppm	c			x				5.3,5.1,0.1,0.1
selenium	10 ppb	c						x	25; < 5
silver	50 ppb		x						
fluoride	4 ppm				x				2.58, 0.76
Common Parameters	2°S**								
chloride	250 ppm		x						
copper	1 ppm								
iron	300 ppb		x						
manganese	50 ppb		x						
sulfate	250 ppm				x				360
zinc	5 ppm								
total dissolved solids	500 ppm		x						
sodium	--				x				325 ppm

*Maximum Contaminant Level-- legal standard set by EPA

**Secondary Standard-- non-enforceable standard set by EPA

***The MCL for gross alpha does not include the alpha activity contributed by uranium or radon, so values over 15 pCi/l aren't necessarily in violation.

(1) Needs to be tested
   a. no data available; testing required by law
   b. no data available; testing not legally required but should be done
   c. data exist, but more tests needed to check results or monitor changes
(2) acceptable results
(3) fairly high-- no health effects indicated in literature
(4) fairly high-- could affect sensitive individuals
(5) approaching the legal standard-- needs to be monitored

Table 2.10. Status of Licensed Conventional Mill Sites in the United States as of January 1, 1983

State	Location	Name and/or Owner	Year Mill Started	Max. Licensed Mill Capacity (MT Ore/Day)	MT of Tailings (Millions)	Size of Tailings Pile (Acres)	Operating Status
Colorado	Canon City	Cotter Corp.	1958	1,100	1.7	165	Active
	Uravan	Union Carbide Corp.	1950(a)	1,200	9.0	85	Standby
New Mexico	Seboyeta	Sohio-Reserve	1976	1,500	1.9	140	Standby
	Church Rock	United Nuclear Corp.	1977	2,700	3.2	200	Standby
	Bluewater	Anaconda	1953	5,400	20.7	300	Standby
	Ambrosia Lake	Kerr-McGee Nuclear Corp.	1958	6,300	27.6	328	Active
	Milan	Homestake Mining Co.	1958	3,100	19.2	210	Active
	Marquez	Bokum Resources Corp.	-	2,000	-	-	Closed
South Dakota	Edgemont	Tennessee Valley Authority	1956	500	2.1	123	Closed
Texas	Panna Maria	Chevron	1979	2,300	3.3	160	Active
	Falls City	Conoco and Pioneer-Nuclear Inc./	1972	3,100	8.0	240	Standby
	Ray Point	Exxon, USA (Susquehanna-Western)	1970	800	0.4	47	Closed
Utah	Blanding	Energy Fuels Nuclear	1980	1,800	1.1	116	Active
	La Sal	Rio Algom Corp.	1972	700	2.3	100	Active
	Moab	Atlas Corp.	1956	1,300	9.3	128	Active
	Hanksville	Plateau Resources, LTD.	1982	700	0.0	68	Standby
Washington	Ford	Dawn Mining Co.	1957	400	2.9	133	Standby
	Wellpinit	Western Nuclear	1978	1,800	2.3	89	Standby
Wyoming	Gas Hills	Federal-American Partners	1959	900	5.4	117	Standby
	Gas Hills	Pathfinder Mines Corp.	1958	2,300	8.6	248	Active
	Powder River (Bear Creek)	Rocky Mountain Energy/Mono Power	1977	1,800	4.5	120	Active
	Powder River (Highland)	Exxon, USA	1972	2,900	6.5	200	Active
	Jeffrey City	Western Nuclear Corp.	1957	1,500	7.0	167	Standby
	Gas Hills	Union Carbide Corp.	1960	1,300	6.5	146	Active
	Shirley Basin	Pathfinder Mines Corp.	1971	1,600	5.3	400	Active
	Shirley Basin	Petrotomics Co.	1962	1,400	5.0	140	Active
	Red Desert	Minerals Exploration Co.	1981	2,700	10.9	174	Active
			TOTALS	30,600(b)	174.7	4,344	

(a)Ore processed at the Vanadium facility for the Manhattan project in 1943.

(b)Total capacity of 14 mills in active operating status as of January 1, 1983. Additional capacity of 19,200 MT ore/day from 10 mills was on standby as of this date.

TABLE 3

PROJECT AREA WATER QUALITY
LYMAN-JONES, WEST RIVER, OGLALA SIOUX RURAL WATER SYSTEMS

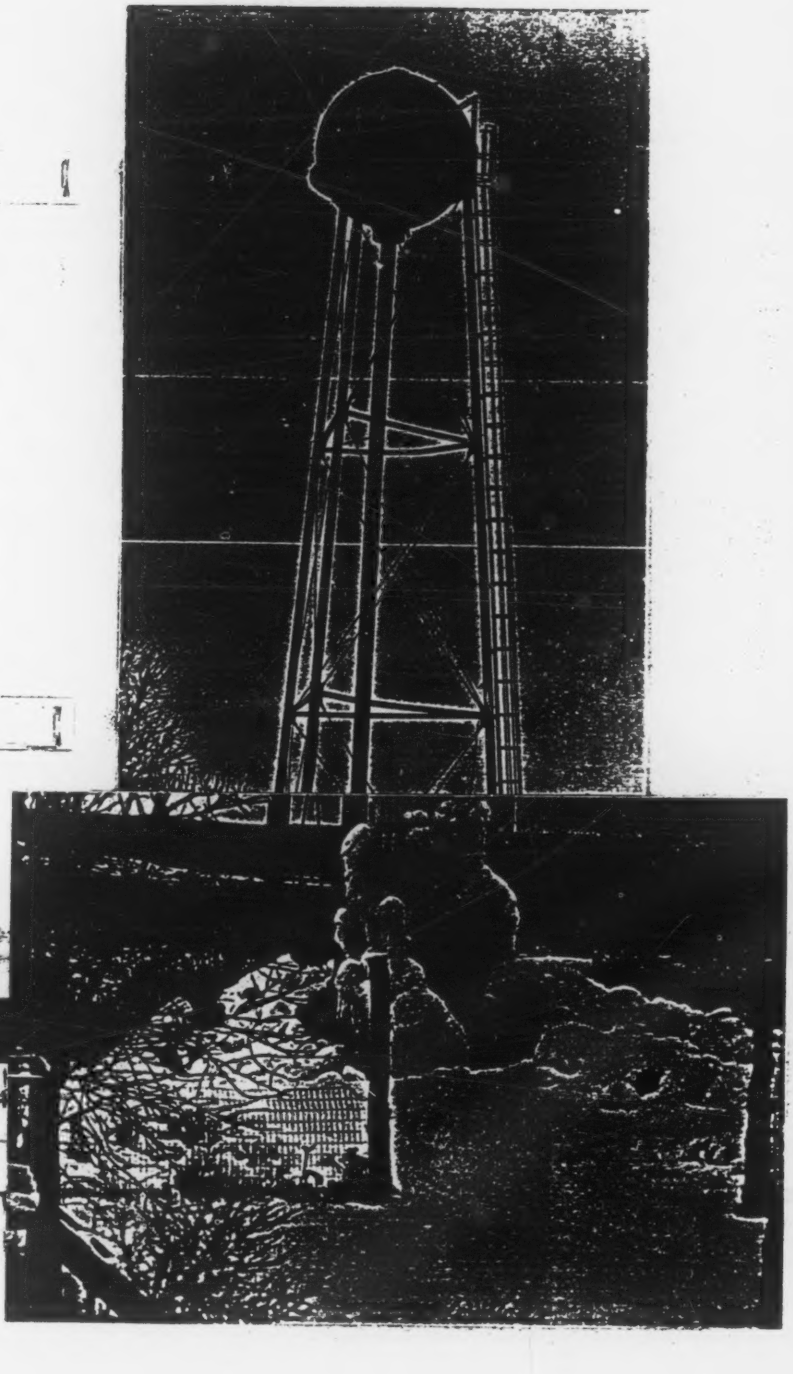
Location	Depth feet	Total Disolved Solids mg/l	Sodium mg/l	Calcium mg/l	Chlorides mg/l	Sulfate mg/l	Iron mg/l	Manganese mg/l	Fluoride mg/l	Radium-226 pCi/l
Pennington County										
Well No. 4	3,200	689	254	2.7	8.8	194	0.06	<0.02	2.39	-
Quinn	3,030	774	363	2.2	11.0	306	0.03	0.01	3.95	-
Haakon County										
Philip	4,010	1,205	18	218	21.1	628	0.56	0.02	<1.74	1.9
Midland	3,310	1,435	28.3	273	28.5	770	0.20	<0.02	2.25	10.3
Jackson County										
Kadoka	2,740	1,815	518	68	69	1,019	1.20	0.25	1.40	-
Belvidere	2,500	1,845	636	6.6	56.6	896	1.68	0.05	1.95	-
Interior	<40	972	316	48.9	20.4	218	0.10	0.02	0.26	0.1
Wanblee	200	356	103	12.2	4.9	3	<0.02	<0.02	4.11	N/A
Potato Creek	200	622	177	43.2	10.9	26	<0.02	<0.02	1.86	N/A
Stanley County										
Hayes	2,000	4,727	1,865	11.2	-	4.5	-	-	2.0	-
Ft. Pierre	60	894	153	80.6	24.8	350	0.70	3.24	1.72	-
Jones County										
Draper	2,170	1,877	746	7.6	392	485	0.15	0.02	2,72	-
Murdo West	2,400	2,111	265	242	69.1	1,200	<6.04	0.22	2.43	-
Lyman County										
Vivian	1,750	1,811	715	13.0	618	25	<0.02	0.03	2.12	-
Presho	1,775	1,424	259	51	188	650	1.76	0.05	2.08	1.7
Kennebec	1,300	1,807	-	290	16	992	1.2	0.00	2.8	7.0
Reliance	1,281	1,180	123	361	105	1,180	2.61	0.20	2.29	-
Shannon County										
Kyle	178	430	77.9	57.9	7.7	22	<0.02	0.03	0.3	N/A
Manderson	204	443	62.3	62.1	6.0	73	<0.02	<0.02	0.15	N/A
Porcupine	204	334	46.9	40.2	5.2	8	<0.02	<0.02	0.65	N/A
Bennett County										
Allen	180	264	6.5	46.9	3.5	3	<0.02	<0.02	0.31	N/A
Lake Oahe	-	500	72	52	12	220	0.19	0.02	0.4	-
DRINKING WATER STANDARDS										
Maximum Recommended	-	500	20	N/A	250	250	0.3	0.05	2.4	5

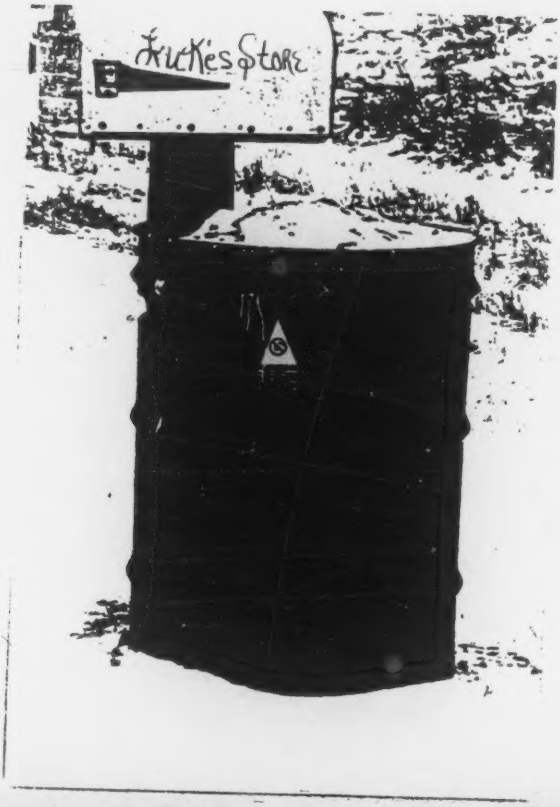
SOURCES: South Dakota Department of Water & Natural Resources, Public Water System Data
S.D. Geological Survey, "Geology & Hydrology of the Dakota Formation in South Dakota",
by Robert A. Schoon, 1971.

DEATH RATES FOR SELECTED CAUSES 1900-1982

	DEATHS/100,000 population					
	1900-04	1920-24	1940-44	1950	1980	82
Typhoid fever	16.7	7.3	0.6	0.1	0.0	----
Comm. diseases of children	65.2	33.8	4.6	1.3	0	----
Measles	10.0	7.3	1.1	0.3	0	----
Scarlet fever	11.8	4.0	0.4	0.2	0	----
Whooping Cough	10.7	8.9	2.2	0.7	0	----
Diptheria	32.7	13.7	1.0	0.3	0	----
Pneumonia & Influenza	184.3	140.3	63.7	31.3	23.3	21.8
Influenza	22.8	34.8	13.0	4.4	1.1	0.3
Pneumonia	165.5	105.5	50.7	26.9	22.0	21.5
TB	184.7	96.7	43.4	22.5	0.8	0.9
Cancer	67.7	86.9	123.1	139.8	182.5	188.1
Diabetes Mellitus	12.2	17.1	26.2	16.2	15.0	14.3
Major heart diseases	359.5	369.9	490.4	510.8	434.5	420.5
Diseases of heart	153.0	169.8	303.2	356.8	335.2	327.8
Cerebral Vascular Dis.	106.3	93.5	91.7	104.0	74.6	68.9
Nephritis & Nephrosis	84.3	81.5	72.1	16.4	7.6	7.9
Accidents, all	79.2	70.8	73.0	60.6	46.0	41.3
Motor vehicle accidents	---	12.9	22.7	23.1	23.0	20.1
Infant mortality*	----	76.7	42.4	29.2	12.5	11.2
Neonatal mortality*	----	39.7	26.2	20.5	5.4	7.6
Fetal mortality*	----	39.2	28.5	22.9	----	----
Mat. mortality*	----	6.9	2.8	0.8	0.1	0.1
All	1621.6	1106.6	1062.0	963.8	874.2	857.6

*rates per 1000 live births




Fickies Store

ATTENTION!!
th[illegible] container hazardous
when empty

UTAH

Park (C5)—Eroded rock strata in forms of
, pinnacles and pedestals.
National Park (B5)—Giant horseshoe-shaped bowl,
d eroded rock domes, spires, walls and terraces.
tional Park (C5)—Variety of rock formations and
s, canyons, mesas, arches, pinnacles; nearby:
anorama at Dead Horse Point State Park.
tional Park (B5)—Twenty-mile long uplifted cliffs
d crown of white sandstone rock.
ational Monument (A5)—Huge natural amphitheater
m from limestone cliffs.
al Monument (C3)—Fossil remains of dinosaurs
istoric animals; nearby: Flaming Gorge National
.
ational Recreation Area (B5)—Expanding summer
water sports.
National Historic Site (A3)—Monument at com-
first transcontinental railroad.
y (C5)—Spectacular towers of red sandstone.
National Monument (C5)—Three large eroded
e bridges.
National Monument (B6)—309-foot high pink
sandstone arch.
(B3)—State Capitol, Mormon Tabernacle, Mormon
Monument, Brigham Young Monument, Old Log
Museum, Zoo; nearby: Great Salt Lake.
National Monument (B3)—Colorful underground
s.
Park (A5)—Outstanding multicolored canyon and
ssive rock formations, natural amphitheater.

WYOMING

enter of oil region, refinery tours, Fort Caspar
neer Museum; nearby: Teapot Rock, Hell's Half

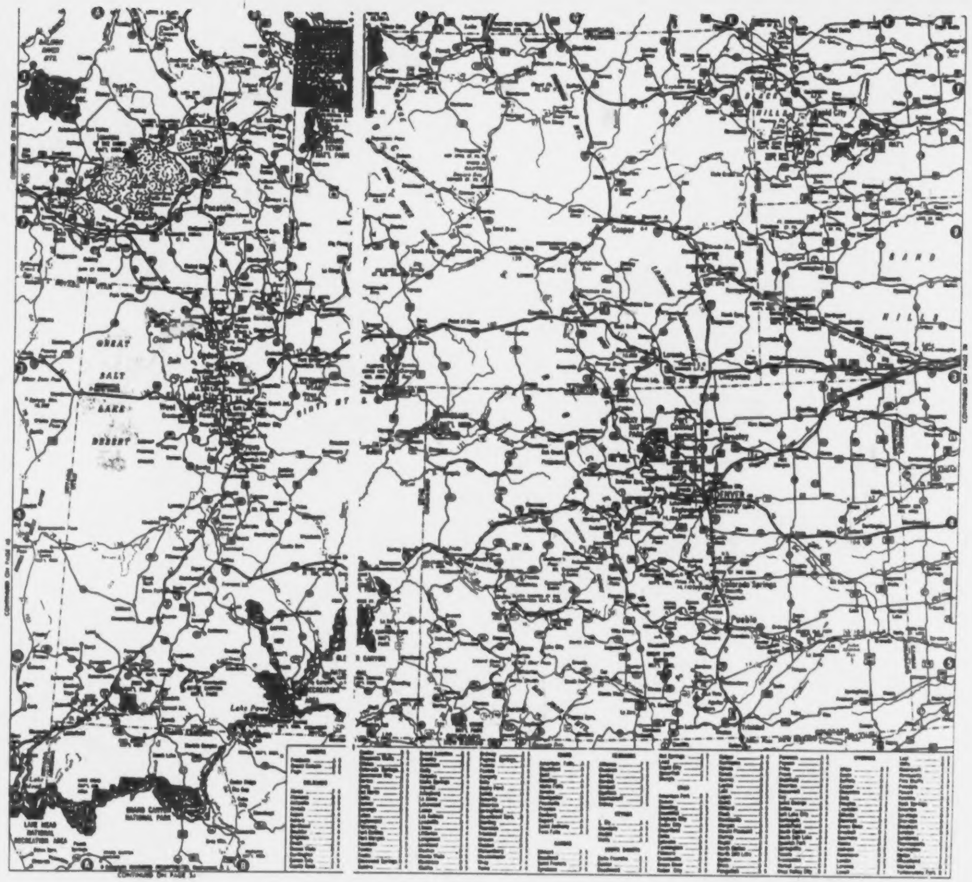
—State Capitol, State Museum, Hereford Ranch,
Cabin.
alo Bill Statue and Museum, Whitney Gallery of
ains Indian Museum, annual Wild West Show, Buffalo

ational Monument (E1)—865-foot column remnant
rosion.
13-30 mi. east of Evanston—Restored fur-trade
museum.
ational Historic Site (E2)—Site of early fur-trading
restorations of later military camp.
National Park (B1)—Impressive series of Rocky
, snow fields and valleys; scenic Jackson Hole,
seum; nearby: Jackson Hole Museum, National Elk
sports area.
1)—World's largest mineral hot springs; nearby:
er Canyon.
tional Park (B1)—World's greatest geyser area,
d pools, volcanic phenomena; spectacular canyon
wildlife sanctuary.

COLORADO

opular mountain resort and winter sports area,
Music Festival, sightseeing mountain chairlift,
gold mining town of Leadville.
f the Gunnison National Monument (B5)—Narrow
ed canyon, black-colored granite.
al Monument (C4)—Steep-walled canyon, tower-
weird sandstone formations.
gs (E4)—Vacation and health resort, Pioneers'
Arts Center; nearby: Pikes Peak, Garden of the
Force Academy, Mount Manitou Incline Railway,
enne Mountain Highway, Cheyenne Mountain Zoo.
tate Capitol, Museum of Natural History, Forney
Museum, Art Museum, U.S. Mint, Larimer Square;
t Mountain, Red Rocks outdoor amphitheater,
town of Central City, pioneer museums at
sports centers.
Scenic narrow-gauge railroad runs between Dur-
ton.
ess National Monument (E5)—Among the largest
fting dunes in the United States.
ational Park (C5)—Most notable and best pre-
ric cliff dwellings in the United States.
National Park (E3)—Impressive mountain area,
s, lakes, streams, forests, abundant wildlife;
Park resort, Shadow Mountain Recreation Area,
Thompson Canyon.
)—Deep rock gorge of red granite, incline railway,
bridge.
ngs (D3)—Famous ski resort, annual Winter
d hot springs.

Map scale 1 inch—91 miles



SIERRA CLUB
NATIVE AMERICAN SITES
COMMITTEE

May 16, 1989

MAY 30 1989

Richard Bad Moccasin
Legislative Assistant
Senator Thomas A. Daschle's Office
317 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Bad Moccasin:

I'm glad I had a chance to meet you when you were in Denver. As I promised you at the Indian Health Services Conference, we have compiled our testimony in writing. I know we are getting it to you close to the hearings, but I hope it will be of some use.

Since the testimony was prepared, we discovered that the EPA had in fact gone to Pine Ridge, however, they missed the uranium contamination, munitions, and heavy metals and found only some old rat poison left behind by the B.I.A. I enclosed the two paragraphs they wrote about their visit for your information. That report is typical of their attitude to the reservation and toxics problem in general.

I have worked with the Sierra Club as a volunteer at the national, state and local level for many years and I have never seen such a clear correlation between the presence of toxics and health problems among the people as there is at Pine Ridge. Instead of finding the underlying causes for the Diabetes rate and other health problems, the EPA has passed the problem back to the Indian people and declared it their fault. Staff members in the Superfund Program at EPA told me the Diabetes among Indian peoples was probably due to all the junk food they eat. Frankly, given the contamination at Pine Ridge, the people there could be practicing health habits beyond that of any health fanatic and still have the same health problems. Radioactive drinking water would be enough to damage anyone's health.

I hope that this testimony will be of assistance. If you need any further information or have any suggestions on how I can be of use on this issue, please call me.

Sincerely,

Julie Andersen

Julie Andersen
Native American Sites Committee
Sierra Club

Written Testimony
presented to

Senate Select Committee on Indian Affairs

by
Arthur Gahbow
Chief Executive

Mille Lacs Band of Chippewa Indians

June 23, 1989

The following written comments are respectfully submitted to the Senate Select Committee on Indian Affairs by Arthur Gahbow, Chief Executive of the Mille Lacs Band of Chippewa Indians. The Mille Lacs Band consists of approximately 2,300 members, about 1050 of whom reside on the Mille Lacs Reservation which was established by Treaty in 1855. The Reservation is in east-central Minnesota near many lakes and rivers.

For the Mille Lacs Band of Chippewa Indians, the idea of attempting to control the environment is new. Our traditional lifestyle included a respect for the power and beauty of nature; however, we recognize that nature had a life, spirit and intelligence superior to mankind. The environment was not ours to control. Indeed, nature regulated us. In the spring we went to the fish camp and harvested fish from the cool pure waters after the ice was gone. We tapped the maple trees for the sweet sap. In summer, we picked a bountiful supply of berries. In the fall we moved to where the wild rice grew and we followed the deer herds. In the winter we chose a secure place to build our shelters which protected us from the frigid cruel north winds. We went where nature told us to go.

When we harvested anything -- fish, deer, rice or berries -- we only took what we needed and offered tobacco to the earth in gratitude. We made sure there would be enough of each resource for the next season and for the next generation.

It was with trepidation that the Mille Lacs Band watched timbermen rape our forests in the 19th century and watched our waters turn to receptacles for sewage in the 20th century.

Unlike the industrial society which surrounds us, we do not seek to control nature. We recognize the absurdity of this proposition. We recognize that nature cannot be controlled and even in this age of spaceships, computers, and miracle drugs, we still must bow to the superior intelligence of the natural world.

Hence, we seek to control those unfortunate people who choose to live their lives out of sync with the sacred rhythms of the ecosystem. We feel that the state and even the Federal Government cannot match the deep abiding respect for the land and water which the Mille Lacs Band retains from lessons taught to us by our elders. Therefore, we seek the ability to take these matters back into our own hands.

We have a well established system for regulating our own hunting, fishing and gathering rights. Our Department of Natural Resources regulates the activities of the Band members in relation to conservation matters. Wardens issue citations and Band members who violate our conservation code are prosecuted in our tribal court.

Recently our Band Assembly, which is the Legislative Branch of our government, has assigned additional duties to our Department of Natural Resources. Those additional duties include a substantial extension of the Band's environmental jurisdiction.

Our Commissioner of Natural Resources has passed several regulations pursuant to the Band Assembly's initiative on ecological issues. An example includes the implementation of an Underground Injection Control Program. This will allow for the tribal regulation of all injection wells operated within the Reservation boundaries. Another is the Sole Source Aquifer Designation which protects Reservation drinking water as well as the water of three non-Indian communities. We are establishing an Emergency Response Board which will devise plans to deal with environmental emergencies and identify potential hazards. Also, we are implementing mechanisms to inform the community on environmental issues. Finally, we are improving our Solid Waste Disposal System.

We have taken these steps in order to further our goals with regard to environmental issues. Our goals are as follows:

A) Ensuring that the Band always will have safe drinking water by protecting ground water and establishing other regulatory measures.

B) Minimizing the pollution of Lake Mille Lacs and other lakes and streams under our jurisdiction.

C) Protecting Band members from harmful air, rain, drinking water, solid waste and other environmental hazards.

The Mille Lacs Band feels it must work towards these goals but currently lacks the funding to pursue these activities. It is notable that the aforementioned programs (Sole Source Aquifer Designation, Underground Injection Control Program, Emergency Response, Community Right to Know and the Solid Waste Disposal System) were all funded through Band revenues. These were extremely difficult to implement because of lack of funding.

The Band has submitted five different requests to the Environmental Protection Agency (EPA) and never received any money.

We have isolated the following problems with regard to our regulation of environmental matters:

1. Lack of funding and a corresponding lack of tribal staff.

2. No clear direction for tribes with jurisdiction over non-Indians creating environmental problems on the Reservation

3. Which agency is responsible to tribes for environmental monies? The Bureau of Indian Affairs, the Indian Health Service, or the Environmental Protection Agency?

We propose the following solutions.

1. Make funding tribes a priority. Allow us to have the chance to take our unique approach to improving the environment. Perhaps we will serve as a model for the state and the federal government. Fund our concept of respect and peaceful co-existence with the environment.

2. Clarify the tribal jurisdiction over civil violations by non-Indians within the Reservation boundaries. We feel that we already have jurisdiction over any violation; however, congressional clarification would be helpful.

3. Currently there are upwards of ten E.P.A. programs. Each has a small amount of money allocated for tribes in general, these amounts are woefully inadequate to meet tribal needs. The application process is tedious and time-consuming. However, if these programs were consolidated and tribes could submit a single budget request to E.P.A., then this problem would be largely eliminated. This consolidation process could be based upon provisions similar to Title III of 93-638 (self-governance project). Under the self-governance project, tribes can access Bureau of Indian Affairs funds for several different purposes. The initial environmental budget could be developed by the Band and the E.P.A. and would be based upon tribal size, needs, and initiatives.

   A substantial administrative funding base should be established under Section 106 to facilitate tribal administration.

4. States should be instructed to recognize and respect tribal environmental jurisdiction.

The Mille Lacs Band seeks to preserve the land, protect the waters and defend its sovereign status. Tribal environmental regulation furthers these goals. In addition, it is possible that the best environmental hope for the future will arise from the knowledge which the American Indians have preserved from their past.

STATEMENT
OF
SENATOR McCAIN
FOR THE
OVERSIGHT HEARING ON THE ADMINISTRATION OF INDIAN PROGRAMS BY THE ENVIRONMENTAL PROTECTION AGENCY

MR. CHAIRMAN: I AM PLEASED THAT WE ARE HOLDING THIS HEARING TODAY. DESPITE YEARS OF HARD WORK BY DEDICATED TRIBAL AND FEDERAL EMPLOYEES, THERE IS ABUNDANT EVIDENCE THAT ENVIRONMENTAL QUALITY ON INDIAN LANDS IS DETERIORATING.

FOR THE MOST PART, THE TRIBAL GOVERNMENTS WERE OVERLOOKED IN THE EARLY FEDERAL EFFORTS TO REGULATE ENVIRONMENTAL QUALITY. IN 1984, EPA BECAME THE ONLY FEDERAL AGENCY TO ADOPT A FORMAL POLICY FOR THE IMPLEMENTATION OF PRESIDENT REAGAN'S INDIAN POLICY. IN 1986 AND 1987, THE CONGRESS ADOPTED AMENDMENTS TO SUPERFUND, THE SAFE DRINKING WATER ACT AND THE CLEAN WATER ACT TO AUTHORIZE EPA TO TREAT TRIBES AS STATES. I AM HOPEFUL THAT DURING THIS CONGRESS SIMILAR AMENDMENTS WILL BE ADOPTED FOR THE CLEAN AIR ACT AND THE RESOURCE CONSERVATION AND RECOVERY ACT.

ALL INDICATIONS ARE THAT THINGS ARE NOT GOING AS WELL AS THEY SHOULD IN TRIBAL AND FEDERAL EFFORTS TO ESTABLISH ENVIRONMENTAL REGULATORY PROGRAMS ON INDIAN LANDS. EPA APPARENTLY LACKS ADEQUATE FUNDS FOR THIS EFFORT. WE HAVE RECEIVED NUMEROUS COMPLAINTS FROM TRIBES WHICH SUGGEST THAT SERIOUS THREATS TO RESERVATION ENVIRONMENTS ARE NOT BEING ADDRESSED BY BIA, IHS OR EPA. TRIBAL EFFORTS IN THIS AREA HAVE APPARENTLY BEEN FRUSTRATED BY THE LACK OF COORDINATION AND THE

LACK OF DIRECTION WITHIN THESE FEDERAL AGENCIES. MANY TRIBAL GOVERNMENTS HAVE INDICATED A NEED FOR FEDERAL ASSISTANCE IN THE DEVELOPMENT OF THEIR CAPACITY TO ESTABLISH AND OPERATE EFFECTIVE ENVIRONMENTAL REGULATORY PROGRAMS. WE HAVE ALSO RECEIVED INDICATIONS THAT SOME UNSCRUPULOUS PARTIES HAVE ATTEMPTED TO EXPLOIT INDIAN LANDS IN THE APPARENT BELIEF THAT THEY CAN DEGRADE THE ENVIRONMENT WITHOUT REGARD TO ESTABLISHED ENVIRONMENTAL STANDARDS.

MR. CHAIRMAN, I RECENTLY HAD THE OPPORTUNITY TO RAISE SOME OF THESE ISSUES DIRECTLY WITH EPA ADMINISTRATOR REILLY. I AM PLEASED TO REPORT FOR THE RECORD THAT HE IS AWARE OF THESE PROBLEMS AND THE CONCERNS OF THE TRIBES. I AM EVEN MORE PLEASED TO REPORT HIS PLEDGE TO CORRECT THE LACK OF ADEQUATE ENVIRONMENTAL PROTECTION ON INDIAN LANDS. I LOOK FORWARD TO WORKING WITH MR. REILLY ON THESE MATTERS.

ONCE AGAIN, I WANT TO EXPRESS MY THANKS TO CHAIRMAN INOUYE FOR HIS LEADERSHIP. THIS HEARING IS THE FIRST OF ITS KIND. NO COMMITTEE OF THE CONGRESS HAS EVER INQUIRED INTO THESE MATTERS. IT IS ENTIRELY CONSISTENT WITH CHAIRMAN INOUYE'S DEEP COMMITMENT TO THE WELFARE OF NATIVE AMERICANS THAT WE ARE HERE TODAY. I HOPE THAT THIS WILL BE THE FIRST IN A REGULAR SERIES OF HEARINGS ON THESE MATTERS.

Charles W. Murphy
Chairman
Standing Rock Sioux Tribe
Fort Yates, North Dakota 58538

June 21, 1989

Senate Select Committee on Indian Affairs
U.S. Senate SH-838
Washington, D.C. 20510-6450
ATTN: MO

The Standing Rock Sioux Tribe submits this testimony for the "Oversight Hearing on the Administration of Indian Programs by the EPA," held on June 23, 1989, by the Senate Select Committee on Indian Affairs. Please include this testimony for the record. The Standing Rock Sioux Tribe is concerned that administration of Indian Programs under the Environmental Protection Agency continues to be ineffective. A great deal of improvement in implementation of "Indian coordinators" at the regional level. While these coordinators make it easier for tribes to communicate with and obtain information from EPA, tribes still have difficulty wading through the intricacies of EPA's bureaucratic structure.

Much of the confusion tribes experience regarding EPA-administered programs results from how tribes are treated (or not treated) in various laws administered by EPA. In some laws (Clean Water Act and the Safe Drinking Water Act) tribes are considered the equivalent of states for administrative purposes. Other laws (for example, RCRA and CERCLA) are silent on the status of tribal participation or consider tribes as municipalities. A CLEAR, AGENCY-WIDE POLICY that treats tribes as sovereign entitites equivalent to states for all programs would go a long way in clearing up confusion. This policy needs to be codified with consistent language in all laws administered by EPA.

A primary concern on the Standing Rock Reservation as well as on most Indian reservations, is obtaining and maintaining water of good quality for domestic use. Too often waste water treatement/disposal systems have been sited proximal to private wells or public water supply systems (or vice versa). Degraded water quality and outbreaks of water borne diseases have resulted. These problems can be significantly reduced by appropriate siting of wells and waste water treatment facilities. A greater role for tribes in siting should reduce these problems.

Of particular concern to the Standing Rock Sioux Tribe are potential complications to attainment of primacy over enforcement of drinking water quality standards within reservation boundaries. Tribal primacy under the Safe Drinking Water Act will require regulation of municipal water systems which serve both Indian and non-Indian customers. To complicate matters, the Standing Rock Reservation straddles two states (North and South Dakota). The Standing Rock Sioux Tribe wishes to resolve this matter so that domestic water delivery envisioned in the 1986 Garrison Diversion Unit Reformulation Act (Public Law 99-294) can begin without undue delay.

Tribal needs in implementing environmental programs must be considered. First, funding of new programs will be difficult for many tribes. Second, technical expertise may take time to develop.

Congress and EPA can reduce the scale of these problems by assuring that adequate monies are available for Indian programs. Training grants are especially important initially, so that each tribe can develop the expertise needed to run an effective environmental program. EPA could aid tribes by providing consulting, especially on technical or design questions.

The Standing Rock Sioux Tribe in cooperation with Sioux County, North Dakota, will soon site and construct a new landfill to serve tribal and non-tribal customers. Clear direction from EPA will be needed to allow the tribe to effectively regulate this landfill.

The Standing Rock Sioux Tribe appreciates the opportunity afforded by these hearings to comment on needs and opportunities in the administration of Indian programs by EPA.

Sincerely,

Charles W. Murphy
Chairman

CWM:pay

RESOLUTION No. 5-89

WHEREAS, the Standing Rock Sioux Tribe is an unincorporated Tribe of Indians having accepted the Indian Reorganization Act of June 18, 1934, with the exception of Article 16, and the recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council, and

WHEREAS, the Standing Rock Sioux Tribal Council pursuant to the amended Constitution of the Standing Rock Sioux Tribe, Article IV, Section 1(a), 1(c), 1(j), 1(o), and 1(q), is empowered to negotiate with Federal, State, local governments and on behalf of the Tribe; is further authorized to promote and protect the health, education and general welfare of the members of the Tribe; is authorized to manage, protect and preserve the property of the Tribe and the wildlife and natural resources of the Standing Rock Reservation; is empowered to safeguard and promote the peace, safety, morals, physical and general welfare of members of the Tribe; is further empowered to employ counsel or consultants for the protection and advancement of rights and property of the Tribe and its members; and

WHEREAS, the Standing Rock Sioux Tribe must be ensured that its total environment is protected through the implementation of the authorities and the programs as authorized with the Environmental Protection Agency for the development and enhancement of the Tribe's institutional capabilities to implement EPA's authorities and programs on the Reservation; to eliminate legislative and regulatory barriers to program implementation (ranging from partial participation of the Tribe to full delegation of programs to tribal government) and the recognition of the Tribe's authority as the primary party for setting standards, making environmental policy decisions and managing programs for the reservation consistent with agency standards and regulations; and

WHEREAS, the Environmental Protection Agency (EPA) is willing to work cooperatively with the Standing Rock Sioux Tribe in developing its standards and authorities for the benefit of the Tribe; and

WHEREAS, it is pertinent to initiate the proper planning coordination with the EPA Regional Office in Denver, Colorado for the development of the applicable tribal environmental protection programs specifically the air, water and ground quality environments; and

WHEREAS, the Standing Rock Sioux Tribe does establish that Siting Criteria for a Sanitary Landfill prohibits such landfill from being built over an aquifer or in any area that has a well capable of pumping more than 10 gallons of water per minute; and

WHEREAS, the Standing Rock Sioux Tribal Council does support the Corporate Agreement with the City of Fort Yates, the City of Selfridge and Sioux County for a Regional landfill, by matching $100,000 North Dakota Block Grant with $22,500 in tribal funds from the Reservation Resource Program approved by the Aberdeen Area Contracting Officer, subject to tribal regulations; and

WHEREAS, the Standing Rock Sioux Tribe is in the process of developing a tribal strategy as a continually emerging development and resource management guidelines, being revised every four years and fully integrating the members of the Standing Rock Sioux Tribe and their perspectives and capacities: and

WHEREAS, the Standing Rock Sioux Tribe does support the concept of Indian Participation in the Resource Recovery and Conservation Act (RCRA) and seeks legislative authority as a long-term objective as the existing landfills are on trust property in all eight communities and will pose complex solutions regarding the property and disposition of property contrary to the Constitution of the Standing Rock Sioux Tribe.

NOW THEREFORE BE IT RESOLVED, that the Standing Rock Sioux Tribal Council does hereby authorize the coordination, development and enhancement of the applicable environmental protection programs through the Environmental Protection Agency (EPA) including those other federal and state agencies that would contribute to the protection of the Tribe's environment; and

BE IT FURTHER RESOLVED, that the Standing Rock Sioux Tribal Council does establish that Siting Criteria for a Sanitary Landfill prohibits such landfill from being built over an aquifer or in any area that has a well capable of pumping more than 10 gals. of water per minute; and

BE IT FURTHER RESOLVED, that the Standing Rock Sioux Tribal Council does authorize the Corporate Agreement with the City of Fort Yates, the City of Selfridge and Sioux County for a Regional Landfill, by a $100,000 North Dakota Block Grant with $22,500 in tribal funds from the Reservation Resources Development Program, subject to tribal regulations; and

BE IT FURTHER RESOLVED, that the Standing Rock Sioux Tribal Council requests the congressional delegates from North Dakota and South Dakota to seek legislative authority for the Standing Rock Sioux Tribe to participate in the environmental planning and construction of sanitary landfills and solid waste management under the Resource Recovery and Conservation Act (RCRA) as existing landfills must be addressed and potential management programs will pose complex solutions regarding the property and disposition of property in regard to land within the confines of the Standing Rock Reservation.

BE IT FURTHER RESOLVED, that the Chairman and Secretary of the Tribal Council are herein authorized and instructed to sign this resolution for and on behalf of the Standing Rock Sioux Tribe.

Resolution No. 5-89
Page 3

CERTIFICATION

We, the undersigned Chairman and Secretary of the Tribal Council of the Standing Rock Sioux Tribe hereby certify that the Tribal Council is composed of 17 members, of whom 14 constituting a quorum, were present at a meeting thereof duly and regularly called, noticed, convened, and held on the 31st day of January 1989, and that the foregoing resolution was duly adopted by the affirmative vote of 13 members, with 0 opposing, and with 1 not voting. The Chairman's vote is not required except in case of a tie.

Dated this 31st day of January 1989.

Charles W. Murphy, Chairman
Standing Rock Sioux Tribal Council

A T T E S T:

Perry Many Wounds, Secretary
Standing Rock Sioux Tribal Council

OFFICIAL SEAL

STATEMENT OF THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, IDAHO

For The

OVERSIGHT HEARING ON THE IMPLEMENTATION OF THE EPA INDIAN POLICY, JUNE 23, 1989

I. INTRODUCTION

On July 3, 1868, the United States and Shoshone-Bannock Tribes executed the Fort Bridger Treaty, 18 Stat. 685. Under the Treaty and subsequent Executive Orders, the Fort Hall Reservation was established as a permanent homeland for the Tribes. The Tribes are federally recognized with a government organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984.

The Shoshone-Bannock Tribes reside in southeastern Idaho on approximately 1.6 million acres of land. The land base of over 800 square miles is located in the Idaho counties of Bannock, Bingham, Caribou and Power. The cities of Blackfoot and Pocatello are on the northern and southern ends of the Fort Hall Reservation.

The Tribes and individual members hold approximately 96% of the land base in trust, 4% is held in fee simple status. The majority of the population of the Fort Hall Reservation is Indian, 54.3%, and non-Indians comprise 45.7%.

The Fort Hall Reservation has several river systems flowing through the Reservation, which include the Snake River, Portneuf River and Blackfoot River. Water from these rivers is utilized for irrigation and tribal enterprises. The Snake River aquifer is beneath the Reservation and is a major source of groundwater for drinking water and irrigation. The American Falls Reservoir also lies within the Fort Hall Reservation.

The Tribes are located in the Environmental Protection Agency (EPA) Region 10, which includes the states of Idaho, Oregon and Washington. Farming in the form of wheat, beets, alfalfa and potatoes comprise the majority of produce on the Reservation. Cattle and horse ranches are also located throughout the Reservation. There are two major industrial facilities located on tribal and fee land within the Reservation boundaries. The two facilities, J.R. Simplot and FMC, are major mining operations and producers of phosphorus byproducts. The shale for phosphorus has been mined on the Reservation since the 1940's. These facilities are major air polluters on the Reservation and Portneuf Valley. Most recently, EPA recommended that land surrounding the two facilities be added to the Superfund Program list.

There are numerous threats to the environment and to the health and welfare of the residents of the Fort Hall Reservation. Thus, the Shoshone-Bannock Tribes, long ago, made a commitment to protect land, air and water resources of the Fort Hall Reservation.

The Tribes have established both statutes and professional staff to manage environmental programs such as land use planning, zoning, fish and game management, and pesticide control programs. These programs actively assume authority and responsibility to set standards of environmental quality and regulate conduct on the Reservation.

The Tribes have worked extensively with EPA on several environmental programs. The Tribes are actively developing programs for primacy in air and water quality management. Currently, the Tribes are working with EPA assistance to establish a much needed air quality program on the Reservation. EPA is also assisting in the Tribes' sanitation sewer program and water quality program. In the past, the Tribes have worked with EPA to develop a pesticide control program. Given all the agriculture on the Reservation, the Tribes developed a pesticide code, which includes certification licenses to control the use of pesticides.

II. EPA INDIAN POLICY

In January 1983, the United States adopted an Indian Policy Statement recognizing the governmental status of Indian tribes in managing matters affecting tribes and Indian country. The federal policy provided for the establishment of a "government-to-government" relationship between the United States and Indian tribes.[1]

One year later, in November, 1984, the EPA announced a policy to govern its relations with Indian tribes and to implement environmental programs on tribal lands.[2] This formal policy builds on the government-to-government relationship by recognizing that tribal governments are sovereign entities with primary authority and responsibility over Indian lands.

EPA has made commitments to Indian tribes in a variety of areas. EPA has avowed to work with tribal governments as the appropriate parties for making decisions and carrying out program responsibilities affecting tribal lands, their environment and the health and welfare of tribal populations.

---

[1] President Reagan, Statement of Indian Policy. 19 Weekly Comp. Pres. Doc. 98 (January 24, 1983).

[2] EPA, Indian Policy Statement (November 4, 1984).

The ultimate goal of the EPA formal policy is for tribes to assume responsibilities which EPA has traditionally delegated to states. EPA has made a commitment to assist tribal governments in developing programs and preparing to assume full regulatory and management responsibilities over tribal lands. Until tribes have assumed responsibility for the regulatory activities, EPA is required to manage programs for Indian lands.

The policy also commits the EPA to eliminate serious constraints and uncertainties in language of its statutes and regulations. Many of the statutes and regulations limit EPA's ability to work directly or effectively with tribal governments.

EPA has recognized the federal trust responsibility to tribes. In keeping with this responsibility, it has pledged to fully consider tribal interests and protect those interests in carrying out its responsibilities affecting tribal lands.

Another important EPA policy objective is that EPA will urge cooperation and communication with tribes, states and local government. EPA recognizes that the states and tribes have had an antagonistic relationship in the area of regulatory authority.

Finally, EPA will work with other federal agencies to identify and delineate the roles and responsibilities of the agencies to assist tribes in developing their environmental programs.

Given the Tribes' experience in the environmental protection area and its working relationship with EPA, the Tribes have numerous observations, recommendations and an overall evaluation of EPA. The following comments are separated into general comments and specific program comments.

III. EPA AND TRIBAL RELATIONSHIP

A. General Comments

While the Tribes recognize that the EPA Indian Policy was an important first step for the agency towards addressing a long overlooked area of environmental protection needs, the Tribes are concerned that the Agency has been remiss in the full implementation of this policy. There is a need for EPA to strengthen the commitments made to Indian tribal governments in the policy if tribes are to effectively deal with the present threats to environmental quality found on Indian lands.

The EPA regulations for Treatment As A State are too restrictive for Indian tribes. The requirement that tribes must project their staffing plan in the Treatment As A State application phase is asking too much of tribes at such an early stage of primacy. This is a "Catch 22" situation requiring tribes to submit their detailed program goals in order to receive funding to develop their program goals. A more appropriate time for EPA to require tribes to develop a realistic staffing and budget projection would be during the program grants phase.

EPA has not provided Indian tribes with the technical assistance that would be expected during the infancy of developing environmental programs. In Region 10, there has not been any EPA sponsored workshops or direct technical assistance provided in over two years. Earlier in the development of water quality programs for states, the EPA provided a great deal of technical support in program development. The lack of technical assistance is inconsistent with the goal of protecting national resources and, in particular, tribal resources. Funding should be set aside to have EPA staff provide technical assistance on all phases of implementing Indian environmental programs.

B. Clean Air Act

Industrial air pollution is a significant problem on the Fort Hall Reservation and a critical concern for the Tribes. The largest elemental phosphorous production plant in the United States is located on the Reservation and annually produces 250 million pounds of phosphorus as well as over 100 tons per year of particulate and hazardous air contaminants. Adjacent to this plant just off the Reservation is a large phosphate acid and fertilizer production plant. The area surrounding these plants has been a non-attainment area for the EPA ambient total suspended particulate air quality standard for over ten years. This area has also been classified as a Group 1 Non-Attainment Area for the new PM-10 particulate air quality standard. It is imperative that this serious and longstanding air pollution problem be regulated.

Air pollution control on the Reservation in the past has been minimal due to a lack of EPA manpower and resources to directly manage a program, the lack of jurisdiction of state agencies on Reservation lands, and the absence of clear language in the Clean Air Act to recognize tribes as states. While the EPA has recently provided the Shoshone-Bannock Tribes with air program funding to address the air pollution problems on our Reservation, the Clean Air Act must be amended to allow EPA to treat the Tribes as a state in order to federally approve the Tribal Implementation Plan and to delegate air pollution control authority to the Tribes so that we may begin to control those sources in the PM-10 Non-Attainment Area located on Reservation lands.

The Shoshone-Bannock Tribes would like to continue to develop a growing partnership with EPA in the same manner as states as outlined in the policy statement. We are concerned that the level of commitment to the Indian policy in the administrative structure of EPA has not been fully realized. The level of program development assistance funding currently made available to tribes is less than needed for achievement of full implementation of the policy and the goal of comparable environmental protection on Indian lands as on state lands.

Tribes recommend that program assistance funding must be made available to tribes at a level commensurate with that given state or local agencies in order for tribes to substantially meet the program requirements of the federal environmental laws. EPA has assisted states in developing pollution regulatory programs on an aggressive timetable in order to meet mandates established by these laws. Where significant pollution problems exist on Indian lands, EPA should be dealing with and assisting tribes in the same manner.

In order for pollution to be adequately regulated throughout the country in the future, it is important for tribes to be fully incorporated into the national framework of pollution control programs established by EPA.

C. Safe Drinking Water Act

In general, the EPA has been very slow in establishing the regulations for the Safe Drinking Water Act (SDWA). The Public Water Supply Program and Underground Injection Program are the only programs that have been opened for Indian tribes. Regulations for the Sole Source Aquifer program and the Wellhead Protection Program have not yet been promulgated.

Funding from Congress has not been appropriated for the Wellhead Protection Program, and funding has run out of the Sole Source Aquifer Demonstration Program before the Indian tribes had access to it. These two programs are very important to the tribes that depend on groundwater for their drinking water. The nature of Indian reservations is that large populations live in scattered homesites. Only the Wellhead Protection Program and the Sole Source Aquifer Demonstration programs are directed towards protecting this drinking water source.

The Fort Hall Indian Reservation population depends on groundwater as its sole source of drinking water. The Tribes advocate that the Wellhead Protection Program and the Sole Source Aquifer Demonstration programs be funded on Indian lands.

The Public Water Supply Program for Indian tribes has a set aside of 3% of the national appropriations. This is inadequate funding for setting up such a large program so important to human health. EPA did not indicate any justification for such a small appropriation, and apparently, it was not based on any needs assessment criteria. An appropriation of ten percent (10%) would seem more reasonable during the first few years of setting up drinking water protection programs.

D. Clean Water Act

The EPA has established very few of the Clean Water Act programs for Indian tribes. EPA has only allowed tribes to participate in two programs, the Clean Lakes Program and the Water Quality Management Program. A more rapid implementation schedule to allow tribes to participate in approximately 30 other programs would ensure that the water resources that are shared with the states are adequately protected.

The Construction Grants Program has been EPA's largest program. For over a decade, the EPA has provided grants to states and local communities to construct community sewer systems. In 1987, EPA simultaneously made a decision not to fund states, but gave tribes the opportunity through FY '90 to apply for grants. The Shoshone-Bannock Tribes, three weeks ago in June, received notice from EPA to apply for a grant. States have set up revolving loan programs. In 1990, tribes will be required to apply to states to obtain a loan for sewer systems and improvements.

The EPA has established a policy where the Indian tribes will have to apply to a state for wastewater funding. This is directly contrary to the EPA policy of dealing with tribes as separate sovereign entities, its trust responsibility and assisting tribes in developing their environmental programs.

Tribes do not have the tax base or resources to establish the funds for a revolving loan fund. Therefore, all tribes will soon have to apply for a loan from a state, or be unable to provide adequate sanitation facilities. The states have a wide variety of regulations on dealing with Indian tribes and for security on the loans. It is obvious that many Indian tribes will simply be denied the opportunity to apply for loans. Consequently, without grant money they will not have the resources to construct sanitary facilities.

The solution to this problem is to continue the construction grant program for Indian tribes for at least five years. EPA should either set up a revolving loan program for Indian tribes within EPA, or capitalize a fund for each reservation. It is wrong to assume that Indian tribes can step right into the wastewater construction program without funding support.

The Clean Water Act programs set aside funding is also inadequate to allow Indian tribes an opportunity to realistically start up the intended programs. For example, this year the Clean Lakes program (Section 314) was opened up to Indian tribes and $225,000.00 was set aside for the entire nation. This is simply an impossible amount for the tribes to work with and will result in degradation of water quality in our lakes.

Other Clean Water Act programs have no funding appropriations. For example, Section 319, intended for non-point pollution protection, has no funding for Indian tribes. The Shoshone-Bannock Tribes have a great need for implementing non-point source programs, and we support realistic funding appropriations for these Clean Water Act programs. Non-point programs protect underground water sources from pesticides accumulation and degradation. Groundwater is the sole source of drinking water on the Fort Hall Reservation.

The Shoshone-Bannock Tribes are concerned about the Interim Ruling, 54 Fed. Reg. 14354 (April 11, 1989). This regulation cuts out funding which the Clean Water Act intended for Indian tribes to use for non-point source water quality protection. The basis for this is that the lack of funding in wastewater construction makes it inappropriate to set aside funding for these programs. Dropping the funding for these programs [(205(j),(1), and 205(j)(5)] is arbitrary and contrary to the EPA Indian Policy.

Tribes should have a choice of the programs they feel are the highest priority. To take away their choice of programs substracts from EPA's Indian policy directing the agency to: "...give special consideration to Tribal interest in making Agency policy and to insure the close involvement of tribal governments in making decisions and managing the environmental programs affecting reservation lands."

The Shoshone-Bannock Tribes have a tremendous need for implementing non-point programs specific to 205(j) programs. The proposed EPA ruling goes against the Tribes' essential needs. The Tribes recommend that EPA change the Interim Regulation and allow Indian tribes the opportunity to apply for the 205(j) programs as the Clean Water Act intended.

E. Federal Insectide, Fungicide, and Rodenticide Act (FIFRA)

Pursuant to FIFRA, the Tribes have developed a pesticide testing and licensing program and submitted the certification plans of private pesticide applicators to EPA. In addition, the EPA has enacted a Pesticide and Farm Chemical Code to regulate the distribution, storage, transportation, use, and disposal of pesticides on the Reservation.

The Tribes have a good working relationship with the EPA and the state. Communication and cooperation between the EPA and Tribes have been exceptional. The EPA representative has taken an active role in providing technical advice and support for the Tribes' program. The EPA has responded well to Tribal comments and questions and funding has been sufficient.

F. Coordination Between Federal Agencies

The EPA made a commitment to coordinate environmental issues and programs between federal agencies regarding tribal lands. The Resource and Conservation and Recovery Act (RCRA) governs the transport, storage and disposal of hazardous waste. The Shoshone-Bannock Tribes, however, have never been informed about any information of disposal of waste activities at the Department of Energy site, Idaho National Engineering Laboratory (INEL). The Tribes are concerned about the transportation of hazardous waste materials via railroad and highways which bisect the Fort Hall Reservation. EPA has never solicited comments from the Tribes regarding the transport of waste, nor have the Tribes been informed of the tracking of such waste. Finally, the Tribs have never received any technical training or funding for personnel in case of a hazardous spill on the Reservation.

In general, EPA has failed to work with the Tribes as it has with the state of Idaho and its political subdivisions regarding hazardous wastes. Under RCRA, tribes are expressly included within the definition of "municipalities" and only states are eligible to assume responsibility. Tribes, thus, are ineligible to assume EPA responsibiities under RCRA or receive program support grants. The statutory barriers in RCRA need to be amended to allow Tribes to assume responsibility for protection of their environments.

IV. CONCLUSION

EPA's track record since announcing its Indian Policy is not a stellar one. There have been minor changes in EPA's culture, but there is still resistance through lack of funding and technical assistance in developing tribal environmental programs. EPA also needs to fully recognize the proper role of tribal governments in regulating environmental policies on reservation lands. Thus far, Tribes have not been full participants in pollution activities affecting its environment and people.

SOUTHERN UTE INDIAN TRIBAL COUNCIL

Tribal Affairs Building
POST OFFICE BOX 737
IGNACIO, COLORADO 81137
303-563-4525

LEONARD C. BURCH, CHAIRMAN
VIDA B. PEABODY, VICE CHAIRMAN
CLEMENT J. FROST, COUNCIL MEMBER
RICHARD L. JEFFERSON, COUNCIL MEMBER
ORIAN L. BOX, COUNCIL MEMBER
GUY PINNECOOSE, JR., COUNCIL MEMBER
LILLIAN I. SEIBEL, COUNCIL MEMBER

June 14, 1989

Honorable Daniel K. Inouye, Chairman
Select Committee on Indian Affairs
United States Senate
Attention: Virginia Boylan
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Inouye:

The Southern Ute Indian Tribe appreciates being given the opportunity to supply the following written comments for your consideration in reviewing the U.S. Environmental Protection Agency's implementation of its Indian Policy. The EPA Indian Policy was issued in 1984 at the direction of then President Reagan. It was the stated policy of EPA to treat tribes as sovereign governments on the same level as states. EPA committed itself to acquiring the resources and to instituting the changes that would allow tribes to become full participants in environmental protection in the United States. Five years after the pronouncement of the EPA Indian Policy, some small victories have been won, but all-in-all the implementation of the Policy has been disappointing.

The obstacles to implementation of the Policy are many and varied. We, however, will only comment on two of the obstacles that we perceive as the major obstacles to implementation of the Policy. The first major obstacle that we have personally come up against is the lack of adequate funding. Funding levels must be adequate to allow tribes to have a chance to build a solid foundation for a successful environmental program. Funding proportionately equivalent to that provided to states when the states were first developing their environmental programs in the 1970s should be considered a minimum funding level. EPA and Congress have taken the attitude that tribes can develop and implement these environmental programs on a shoestring budget. EPA committed itself to seek adequate funding to make the goals set out in the Policy succeed. EPA has not lived up to this commitment.

EPA has failed to request that Congress provide independent funding for Indian environmental programs. Instead, EPA is attempting to fund Indian programs out of money budgeted for the state programs. EPA further arbitrarily limits the amount of these state program funds available for Indian programs to three percent (3%) of the total state program funds. EPA must live up to its commitment to provide adequate funding for Indian environmental programs whether it be through seeking adequate funding from Congress or using the funds already available to EPA.

The second major obstacle to full implementation of the EPA Indian Policy which we see is the apparent lack of commitment to the Policy at all levels of the agency. The lack of commitment is behind all obstacles preventing full implementation of the Indian Policy. If the commitment were present, the means for implementation of the policy would be found. This lack of commitment is apparent in a number of different ways, for example, the failure of the EPA to press Congress to include Indian amendments in the Clean Air Act and Resource Conservation Recovery Act reauthorization; the failure of EPA to request independent and adequate funding of Indian programs from Congress; the failure of EPA to create or assign adequate staff within EPA to timely promulgate rules under the Clean Water Act and the Safe Drinking Water Act. This lack of commitment is a disease that will gradually destroy any potential for success of the Indian Policy. To make the Policy work, the Administrator of EPA must let it be known that he is behind the Policy completely and the rest of the agency will fall into line. The Administrator could start to show commitment to the Policy by appointing an Indian policy Coordinator that would have direct access to the Administrator.

It must also be noted that the failure of environmental protection on Indian reservations cannot be blamed on the Environmental Protection Agency alone. Any federal agency that deals with Indian tribes has the responsibility and duty to assure that their programs and policies foster and promote environmental protection on the reservation. It is not adequate for these agencies to ignore environmental issues because EPA now has an Indian Policy. Federal agencies that have a presence on the reservations should develop interagency lines of communication in order to foster cooperative programs aimed at improving environmental protection on the reservation. The tribes and the federal agencies must be creative in finding solutions to these problems.

We would like to close our comments with one last thought that we hope the Committee will keep in mind throughout the hearings. The overall goal of the EPA Indian Policy is to provide the same level of environmental protection in Indian Country that the rest of the Nation enjoys. This goal should guide the Committee in these proceedings. The Committee's review of EPA's performance should be done with the intent of enhancing this overall goal. The Committee should strive to provide EPA with positive, constructive guidance on how to better achieve this overall goal. Finally, Congress must recognize that it must provide the funding levels necessary to make the Indian Environmental programs work or EPA's efforts will be futile.

Thank you for this opportunity and we hope that your efforts can help to move environmental protection within Indian Country forward.

Sincerely,

Leonard C. Burch

Leonard C. Burch, Chairman
Southern Ute Indian Tribal Council

LCB:dfv

DAKOTA PLAINS LEGAL SERVICES

June 27, 1989

Sen. Daniel K. Inouye
Hart Senate Office Bldg.
Suite 722
Washington, D.C. 20510

RE: Dump Sites on the Pine Ridge Indian Reservation

Dear Senator Inouye:

For the past four years our program, Dakota Plain Legal Services has been representing Native Americans living on the Pine Ridge Indian Reservation in litigation to try to get the EPA, the BIA and IHS to assist in the cleanup of fourteen (14) dump sites on the reservation. All but one of these sites is located on land held in trust by the United States and the government has acknowledged throughout the course of the litigation that the dumps are in violation of the Resource Conservation and Recovery Act (RCRA), 42 USC §6901 et. seq.

I recently became aware of your concern about environmental conditions in Indian country as a part on the investigation being done by the Senate Select Committee on Indian Affairs.

The United States has fought tooth and nail throughout the course of this litigation to avoid responsibility for these dumps or to assist the Oglala Sioux Tribe with this very serious problem. Because I did not know if you were aware of this litigation and the underlying problem, which I believe exists on all South Dakota's reservations, I thought you would find the two court opinions and the briefs useful in understanding this situation. It immediately becomes clear from reading the briefs that the United States thinks it has very little obligation to do anything about this situation. I have also enclosed for your reference pictures taken last year at one of the dump sites. I believe these pictures are typical of all the sites.

Please address reply to:

☑P.O. Box 727
Mission, SD 57555
605-856-4444
1-800-458-4419

☐P.O Box 507
Fort Yates, ND 58538
701-854-7204

☐P.O. Box 500
Eagle Butte, SD 57625
605-964-2175

☐P.O. Box 1989
Pine Ridge, SD 57770
605-867-1020

☐P.O. Box 250
Sisseton, SD 57262
605-698-3971

☐P.O. Box 656
Fort Thompson, SD 57339
605-245-2341

☐200 West Pleasant Avenue
Pierre, SD 57501
605-224-6274

Finally, at this time we have been advised by the Justice Department that the government is considering asking the Supreme Court to review this case. I don't know if a decision concerning that has been made yet or not.

If you have any questions about anything I have enclosed or said, please advise. Thank you for considering this matter.

Sincerely,

Krista Clark

Krista H. Clark
Attorney at Law

KHC/jv

Enclosures

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 87-5433, 87-5434

Taylor Wallace Blue Legs,
Executor of the Estate of
Mattie Blue Legs, deceased;
and Margaret Jenkins,

Appellees,

v.

United States Bureau of
Indian Affairs, United States
Indian Health Servic[illegible]d

Oglala Sioux Tribe,

Appellant.

Appeals from the United States
District Court for the
District of South Dakota.

Submitted: June 13, 1988

Filed: February 9, 1989

Before HEANEY,[*] Circuit Judge, EDWARDS,[*] Senior Circuit Judge, and MAGILL, Circuit Judge.

HEANEY, Circuit Judge.

Taylor Wallace Blue Legs and Margaret Jenkins are members of the Oglala Sioux Tribe (Tribe) of Indians and reside on the Pine Ridge Indian Reservation (Reservation). They brought suit against the Environmental Protection Agency (EPA), the EPA's Administrator, the Bureau of Indian Affairs (BIA), the Indian Health Service (IHS) and subsequently joined the Tribe, complaining that garbage dumps located on the Reservation were maintained in violation of federal law. The United States District Court for the District of South Dakota dismissed the EPA and its Administrator. It ordered the Tribe, the BIA and IHS to submit a plan within 120 days to bring the dump sites into compliance. 668 F. Supp. 1329 (D. S.D. 1987) (stayed pending our review).

---

[*] The HONORABLE GERALD W. HEANEY assumed senior status on January 1, 1989.

[*] The HONORABLE GEORGE C. EDWARDS, JR., United States Senior Circuit Judge, for the Sixth Circuit, sitting by designation.

On appeal, the Tribe argues that it is immune from suit, that resort must first be made to tribal courts, and that in any event, BIA and IHS are solely responsible for compliance. BIA and IHS argue that they have no legal duty to clean up the dumps; rather, the Tribe is responsible. We affirm the district court and hold that the Tribe, BIA and IHS share the responsibility of bringing the garbage dumps into compliance.

BACKGROUND

The district court's order covered fourteen dump sites located on the Reservation. "Most of the sites are in the vicinity of or near one or more of the following: houses, schools, and streams or springs." 668 F. Supp. at 1333. The court found that twelve sites are unfenced. Six sites lack sanitary trenches. No site has a dirt covering. No site is supervised. All locations have had fires at the sites. 668 F. Supp. at 1331-32. Laboratory analysis of water samples from the sites showed "significant contamination," including organisms capable of "caus[ing] disease in wildlife and frequently in humans * * * urinary tract infections and infections of the respiratory system * * * neonatal infections, involving the central nervous system and other organs." Plaintiff's Exhibit No. 63. Children, pets and others can easily come in contact with the sites given the present condition of the dumps. Moreover, the sites represent a danger even to those who do not wander near them.

> In conditions of high rainfall and/or flooding, as undoubtedly occurs in your geographical-climatic area, spread of all these potentially pathogenic bacteria would occur readily. Surface wells and insufficiently protected drinking water would be contaminated quite easily. Also, the flies and other disease vectus from the dump sites can spread these organisms to food and other entry sites to humans.

Id.

An outbreak of disease threatens people living off the Reservation as well.

BIA and IHS operate schools, a hospital, a health station, and own over 47 homes and other residences on the Reservation. BIA and IHS dispose of their trash through the Pine Ridge Village Garbage Service (Service), an adjunct of the Tribe. At some locations BIA personnel transport the waste directly to disposal facilities; at other locations the Service collects the waste. Immediately, infectious waste is incinerated at the IHS health stations. IHS provides technical assistance to the Tribe in the form of information and research about solid waste disposal, and has in the past provided some money to help purchase relevant equipment. Neither agency supervises the Tribe's waste disposal but both are aware of the conditions on the Reservation and continue to contract with the Service for disposal in violation of law. 668 F. Supp. at 1331-33.

There is little disagreement between the parties about these facts. This dispute concerns who is to pay for the initial clean-up and subsequent maintenance.

I. THE TRIBE

The Tribe argues that it is immune from this suit, that the plaintiffs must exhaust tribal remedies before proceeding in federal court and that the federal defendants are solely responsible for cleaning up the sites. The district court rejected the Tribe's first two contentions, as do we.

A. Sovereign Immunity

Over the course of the last two centuries Indian tribes have evolved into dependent associations with limited powers of self-government. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-57 (1978). Where Congress clearly indicates that Indian tribes are subject to a given law, no tribal sovereignty exists to bar the reach or enforcement of that law. Id. at 58-59.; United States v. United States Fidelity and Guar. Co., 309 U.S. 506, 512-13 (1940); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956). We turn to the question of whether Congress has abrogated the tribe's immunity in this matter.

Congress passed the Resource Conservation and Recovery Act of 1976 (RCRA) to remedy national problems caused by hazardous waste and solid waste disposal. Pub. L. No. 94-580, 90 Stat. 2795, codified at 42 U.S.C. §§ 6901 et seq., amending the Solid Waste Disposal Act, 42 U.S.C. §§ 3251-59. Congress was concerned that a failure to address all sources of pollution would render efforts aimed at other sources ineffectual.[1]

---

[1] The House Report explained:

> The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and

Congress also decided to regulate the disposal of discarded materials on reservations. Under the RCRA, citizens are permitted to bring compliance suits "against any person (including (a) the United States, and (b) any other governmental instrumentality or agency * * *) who is alleged to be in violation * * * ." 42 U.S.C. § 6972(a)(1)(A).[2] "Person" is

---

> environmentally effective. At present the federal government is spending billions of dollars to remove pollutants from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

H. R. Rep. No. 94-1491, 94th Cong., 2d Sess. pt. 1, at 4 (1976) (House Report), reprinted in 1976 U. S. Code Cong. & Admin. News 6238, 6241-42 (USCAN).

[2] In full, this section allows:

> (a) In general
>
> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--
>
> (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter, or
>
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transportator, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent

subsequently defined to include municipalities. 42 U.S.C. § 6903(15). Municipalities include "an Indian tribe or authorized tribal organization * * * ." 42 U.S.C. § 6903(13)(a). *See also* House Report, *supra* note 1, at 37, USCAN 6275 (specific examples of harm to be avoided, including Indian children playing in dumps on reservations); *State of Washington Dep't of Ecology v. E.P.A.*, 752 F.2d 1465, 1469-71 (1985) (RCRA applies to Indian tribes). It thus seems clear that the text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.

B. Exhaustion

The Tribe makes a related claim that even if it is not immune from suit, respect for tribal self-government requires that the plaintiffs initially bring suit in tribal courts. The government defendants endorsed this claim but clearly indicated under questioning that they would not submit to the jurisdiction of a tribal court.

The judicial preference for tribal court exhaustion is an adjunct to Congress' general preference for tribal self-government. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985). We agree that tribal courts are presumed to have civil jurisdiction over the actions of non-Indians on reservation lands absent the affirmative limitations of federal treaties and statutes. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 94 L.Ed.2d 10, 21 (1987). *See also*, *Fisher v. District Court*, 424 U.S. 382, 388-89 (1976); *Williams*

> and substantial endangerment to health or the environment[.]

42 U.S.C. § 6972(a)(1)(A) (1988 Supp.). *See also*, 42 U.S.C. § 6945(a) (1988 Supp.) (citizen suits available against anyone engaged in open dumping).

v. Lee, 338 U.S. 217 (1959). Determining the "extent of a tribal court's jurisdiction * * * require[s] a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." National Farmers, 471 U.S. at 856. Our examination of the RCRA leads us to conclude that exhaustion of tribal remedies is not required in this case.

The RCRA places exclusive jurisdiction in federal courts for suits brought pursuant to section 6972(a)(1) of the Resource Conservation and Recovery Act.

> Any action under paragraph (a)(1) of this subsection [as this case is] shall be brought in the district court for the district in which the alleged violation occurred.

42 U.S.C. § 6972(a). Accord Middlesex County Board of Union Freeholders v. New Jersey, 645 F. Supp. 715, 719-20 (D. N.J. 1986).

Moreover, Congress has expressed a preference for prompt federal adjudication of citizen suits to enforce the RCRA.

> Although the Committee has not prohibited a citizen from raising claims under state law in a section 7002 action, the Committee expects courts to exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments.

H.R. Rep. No. 98-198, 1, 98th Cong., 2nd Sess., pt. 1, at 53 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 5576, 5612 (relating to Pub. L. 98-616, Title IV, § 401, Nov. 8, 1984, 98 Stat. 3268; amending section 6972).

C. The Tribe's Responsibilities

Finally, the Tribe argues that the federal defendants are responsible for cleaning up the dump sites pursuant to the RCRA and other laws. We agree. We do not accept, however, the Tribe's contention that the Tribe possesses no responsibility to help.

The district court found that the Tribe established and operated the dumps through the Service. The Tribe also generated waste dumped at these sites. We agree with the district court that the Tribe must share responsibility with BIA and IHS for bringing the dumps into compliance. *See*, 42 U.S.C. § 6902(3); 42 U.S.C. § 6945(a) (1988 supp.); 42 U.S.C. § 6972(a). In determining the Tribe's share, the district court must consider the Tribe's ability to pay a portion of the costs and still provide essential services to its people.

II. THE FEDERAL DEFENDANTS

BIA and IHS argue that the RCRA does not obligate them to participate in compliance efforts. We disagree. We think that they are obligated to participate by the RCRA and the Snyder Act, 25 U.S.C. § 13.

A. RCRA

The RCRA obligates the BIA and IHS to insure compliance with Environmental Protection Agency regulations. BIA and IHS are admittedly engaged in some activities in violation of the RCRA's open dumping provisions.[3] These activities trigger corresponding obligations in two ways.

First, the RCRA prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste * * * ." 42 U.S.C. § 6945. These agencies are thus subject to court-ordered relief. Section 6961 of the RCRA requires:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government * * * engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements * * * .

---

[3] Both federal agencies operate facilities on the Reservation which generate waste. Most of the waste generated at these facilities is transported to tribal dumps by a tribal agency, the Pine Ridge Village Garbage Service. In this case, the two agencies violate the requirements of Section 4005 of RCRA, 42 U.S.C. -6945, in two respects only: one is where employees of the Bureau of Indian Affairs transport solid waste directly to three tribal dumps, and the other is where the IHS at two sites burns waste in open drums. The agencies recognize that these direct violations of RCRA must cease.

* * * *

The IHS contracts with the Pine Ridge Village Garbage Service and has informal arrangements with BIA contractors to remove the solid waste generated at its facilities on the Reservation. These haulers transport the trash to open dumps operated by the Tribe.

Brief for the Defendants-Appellants, at pp. ii and 13.

The district court found that BIA and IHS contributed to open dumping on the Reservation by generating solid waste, contracting for its disposal and, in some instances, transporting solid waste to dumps operated in violation of federal law. They were therefore "engaged in activity resulting in the disposal of solid waste" within the meaning of the statute. Thus, the district court has the power to order BIA and IHS to undertake whatever compliance efforts are necessary. 42 U.S.C. § 6961, supra.[4] See also, House Report, supra note 1, at 5, 8; USCAN at 6243, 6245.

Second, the district court held that BIA and IHS were engaged in solid waste management activities in violation of 42 U.S.C. § 6964. 668 F. Supp. at 1340-41. We agree. Section 6964 provides:

> **§ 6964. Applicability of solid waste disposal guidelines to executive agencies**
>
> **(a) Compliance**
>
> (1) If --
>
> (a)(1)(A) (A) an Executive agency (as defined in section 105 of title 5) or any unit of the legislative branch of the federal government has jurisdiction over any real property or facility the operation or administration of

---

[4] On its face, § 6961 might be construed as a waiver of the government's sovereign immunity only with respect to injunctive or other equitable relief. See McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986). Because neither we nor the district court have ordered civil penalties, we need not define the exact boundaries of permissible liability under section 6961. Other courts have clearly held that section 6961 permits those steps necessary to the implementation of applicable environmental standards. See e.g., Parola v. Weinberger, 848 F.2d 956, 962 n.3 (9th Cir. 1988). See also, Ohio v. United States Dept. of Energy, 689 F. Supp. 760, 764-65 (S.D. Ohio 1988) (declining to read § 6961 narrowly).

> which involves such agency in solid waste management activities
>
> * * * *
>
> then such agency shall insure compliance with the guidelines recommended under section 6907 of this title and the purposes of this chapter in the operation or administration of such property or facility, or the performance of such contract, as the case may be.

The government's main argument on appeal is that neither agency has jurisdiction or management responsibility for the dump sites.

The RCRA regulates the activities of even those who do not administer the final dump sites. Parola v. Weinberger, supra note 4, at 960-61 (federal contracts with private haulers). Throughout the RCRA, "[t]he term 'solid waste management' means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." 42 U.S.C. § 6903(28). BIA and IHS together collect, separate, transport and dispose of hazardous and non-hazardous waste at their facilities on the Reservation. Therefore, they do have "jurisdiction" over facilities, "the operation or administration of which involves such agency" in the generation and disposal of solid waste. They administer facilities, the administration of which engages them in regulated activities.

For these reasons, we agree with the district court's conclusion that, under the RCRA, BIA and IHS must share the blame and responsibility for the conditions of these sites.

B. The Snyder Act

The Snyder Act was passed in 1921 to provide general authorization for BIA expenditures. 42 Stat. 208, 25 U.S.C. § 13. The Snyder Act directs the BIA to expend appropriated funds on, among other things, "the relief of distress and the conservation of health." It requires the BIA to exercise an overriding duty of fairness when dealing with Indians. Morton v. Ruiz, 415 U.S. 199 (1974); (a court may order the BIA to expend funds to meet Snyder Act obligations); Fox v. Morton, 505 F.2d 254 (9th Cir. 1974).

Insofar as the Snyder Act imposes affirmative obligations on BIA to relieve distress and conserve Indian health, BIA's conduct on the Reservation in knowingly contributing to health hazards violated BIA's statutory duty. While BIA is vested with some discretion in deciding how to expend fixed sums toward fulfilling statutory goals, where BIA engages in injurious conduct toward the intended statutory beneficiaries, BIA's duty to remedy the wrong is absolute and is not limited in proportion to their contribution to the problem. Cf., Ruiz, supra at 236 (BIA must act consistently with their trust obligations); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256-257 (D. D.C. 1973) (Secretary of the Interior must administer Reclamation statutes as to minimize adverse impact on Indian Reservations). See also, White v. Califano, 437 F. Supp. 543, 555 (S.D. 1977) aff'd 581 F.2d 698 (8th Cir. 1978) (per curiam) (IHS must provide care where state cannot).[5]

---

[5] The IHS is similarly obligated. The Indian Health Care Improvement Act, 25 U.S.C. §§ 1601 et seq. (IHCIA), was passed in part to address the effects of Indians' "lack of safe water and sanitary waste disposal services." 25 U.S.C. § 1601(f)(6). It authorizes the IHS to expend funds to satisfy "unmet needs for safe water and sanitary waste disposal facilities" to the extent Congress appropriates money for this purpose. 25 U.S.C. § 1632. The IHCIA commits this country, through the efforts of the IHS, to "meet the goal of providing the highest possible health status to Indians." 25 U.S.C. § 1602. We think the IHCIA at a minimum obligates the IHS to refrain from contributing to poor health conditions on the Reservation through indifference to the disposal of the solid waste IHS produces.

CONCLUSION

Our holding that BIA and IHS have a duty to clean up the dumps is buttressed by the existence of the general trust relationship between these agencies and the Tribe. See, e.g., United States v. Sioux Nation of Indians, supra, (takings); Menominee Tribe v. United States, 391 U.S. 404 (1968); Seminole Nation v. United States, 316 U.S. 286 (1942) (agency responsible for misappropriation by tribal leaders); United States v. Klamath Indians, 304 U.S. 119 (1938); United States v. Shoshone Tribe, 304 U.S. 111 (1938); United States v. Creek Nation, 295 U.S. 103 (1935) (restricting confiscation); Carpenter v. Shaw, 280 U.S. 363 (1930) (construing terms of a treaty consistent with trust obligations); United States v. Payne, 264 U.S. 446 (1924) (same); White v. Califano, supra, (IHS responsible for health care costs despite absence of statutory duty). The existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute, treaty or other agreement, "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." United States v. Mitchell, 463 U.S. 206, 225 (1983) (finding trust relation created by statutes authorizing federal control of timber production); Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980) ("If * * * the Government means that the document has to say in specific terms that a trust or fiduciary relationship exists or is created, we cannot agree. The existence vel non of the relationship can be inferred from the nature of the transaction or activity.").

The provisions of the RCRA require that executive agencies refrain from activities resulting in violations. Congress intended the obligations of BIA and IHS under the RCRA to be exercised consistent with their trust obligation. Accord State of Washington Dep't. of Ecology, 752 F.2d at 1470 (1985). See *also*, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (construe ambiguous statutes in favor of Indians); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) (same). BIA and IHS have not merely violated the RCRA, but, in so doing, they have violated their fiduciary obligation toward the plaintiffs and the Tribe.[6] They are required to insure that the dumps are cleaned up, even if others contributed to the problem and even if the RCRA does not clearly set forth what role BIA and IHS are to play under the statute.[7]

---

[6] The IHCIA was also passed in recognition of the United States fiduciary obligations with similar effect:

> The Congress finds that --
>
> (a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal government's historical and unique relationship with, and resulting responsibility to, the American Indian people.

25 U.S.C. § 1601.

[7] *Compare* *White v. Califano*, *supra*. In *White*, the district court was required to determine who had a legal duty to care for a mentally ill member of the Tribe. IHS denied responsibility, arguing that the decision should be discretionary because no statute required IHS to provide for involuntary commitment. The court disagreed, finding such a duty in general statutory pronouncements obligating the federal government to provide for Indian health care. 437 F. Supp. at 553-55 (construing the IHCIA). The Court stated in part, "This situation arose, it appears, not from apathy or bad faith but from the uncertain state of the law and the harsh fact that everybody's resources are finite." *Id.* at 557. The district court was not unmindful that the IHS operated with limited resources. The Court, nevertheless, required the IHS to fulfill its obligations. We think *White* supports the view that IHS and BIA must share * responsibility for the clean-up and maintenance of the dumps.

but trust language!

Thus, we reject the government's contention that BIA and IHS owe no obligation to the plaintiffs because they merely contracted with the Service for garbage disposal.

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. * * * In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1941).

Accordingly, we affirm the district court. We leave for the district court the question of how the costs for cleaning and maintaining the dumps are to be apportioned among the defendants consistent with this opinion. We lift our stay of that court's order that the Tribe, BIA and IHS submit within 120 days a proposal for bringing the dump sites into compliance; the district court may modify this time schedule if it wishes.

MAGILL, Circuit Judge, concurring.

I concur in part I of the panel opinion, affirming the Tribe's liability, and in part II.A., premising the liability of BIA and IHS on the provisions of RCA. I write separately to express my disagreement with the remainder of the opinion. I do not think that the Snyder Act or the Indian Health Care Improvement Act impose mandatory obligations on BIA and IHS under these circumstances. Thus, I would find no breach of any trust obligation in this case.

When a promotion opportunity at pay grade 16 occurs for which Colon is qualified, he shall be promoted to that position. In the interim, he is entitled to front pay of $2883.01 per month. Costs of this action will be taxed to the defendants. Colon is entitled to recover a reasonable attorney's fee.

ORDER

For the reasons discussed in the accompanying memorandum,

IT IS DECLARED that the defendants discriminated against the plaintiff on the basis of his national origin in violation of Title VII, 42 U.S.C.A. § 2000e-2.

IT IS ORDERED that upon resolution of the amount of attorney's fees to be awarded judgment shall be entered for the plaintiff and that the plaintiff is awarded:

1. back pay in the amount of $13,357.09;
2. a contribution to his retirement account in the amount of $1602.85;
3. front pay in the amount of $2883.01 per month, plus fringe benefits commensurate with this rate of pay, until a position at pay grade 16 for which the plaintiff is qualified becomes available and to which he is appointed.

IT FURTHER IS ORDERED that the costs of this action are taxed to the defendants, and that the plaintiff is entitled to a reasonable attorney's fee. The plaintiff's counsel shall submit to the court within 10 days an affidavit setting forth her claim for attorney's fees; the defendants shall have 7 days thereafter to submit an affidavit in response.

Taylor Wallace BLUE LEGS, Executor of the Estate of Mattie Blue Legs, deceased; and Margaret Jenkins, Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; Lee M. Thomas, Administrator of the Environmental Protection Agency; United States Bureau of Indian Affairs; United States Indian Health Service; and the Oglala Sioux Tribe, Defendants.

Civ. No. 85-5097.

United States District Court,
D. South Dakota, W.D.

Sept. 3, 1987.

Citizens brought action against Environmental Protection Agency, Bureau of Indian Affairs, Indian Health Service, and Indian tribe for violations of Resource Conservation and Recovery Act in connection with solid waste disposal sites on Indian reservation. Cross motions for summary judgment were filed. The District Court, Battey, J., held that: (1) Indian tribe was subject to provisions of Act; (2) Agency did not have authority over open dumping on reservation; and (3) Bureau and Service could not contribute to open dumping on reservation.

Motions granted in part and denied in part.

1. Indians ⇐32(1)

Indian tribe had responsibility stemming from inherent sovereignty to regulate, operate, and maintain solid waste disposal sites on reservation. Solid Waste Disposal Act, §§ 1002 et seq., 1003(13)(A), (15), 7002, as amended, 42 U.S.C.A. §§ 6901 et seq., 6903(13)(A), (15), 6972.

2. Indians ⇐27(1)

Indian tribe operating solid waste disposal site on reservation was subject to citizen suit under Resource Conservation and Recovery Act. Solid Waste Disposal Act, §§ 1002 et seq., 1003(13)(A), (15), 7002, as amended, 42 U.S.C.A. §§ 6901 et seq., 6903(13)(A), (15), 6972.

3. Indians ⇐32(3)

Resource Conservation and Recovery Act preempted sovereignty of Indian tribe with respect to solid waste disposal sites operated by tribe on reservation. Solid Waste Disposal Act, §§ 1002 et seq., 1003(13)(A), (15), 7002, as amended, 42 U.S.C.A. §§ 6901 et seq., 6903(13)(A), (15), 6972.

4. Indians ⇐2

Indian tribes possess inherent sovereignty, except where it has been specifically taken from them either by treaty or congressional act.

5. Indians ⇐32(1)

Environmental Protection Agency did not have authority over open dumping on Indian reservation, but enforcement encroachment into open dumping on reservation would violate inherent sovereignty of Indian tribe. Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.

6. Indians ⇐32(1)

Resource Conservation and Recovery Act did not give broad grant of power to Bureau of Indian Affairs and Indian Health Service to administer open dumping on Indian reservation, but primary responsibility for enforcement of Act remained with tribe. Solid Waste Disposal Act, § 1002 et seq., as amended, 42 U.S.C.A. § 6901 et seq.

7. Health and Environment ⇐25.5(5)

Bureau of Indian Affairs and Indian Health Service were required to comply with statute governing federal responsibility of executive agency with jurisdiction over real property that involves agency in solid waste management activities and, therefore, could not contribute to open dumping on Indian reservation. Solid Waste Disposal Act, §§ 1002 et seq., 6004, 7002(a)(1)(B), as amended, 42 U.S.C.A. §§ 6901 et seq., 6964, 6972(a)(1)(B); 25 U.S.C.A. § 13; Indian Health Care Improvement Act, §§ 2 et seq., 3, 302, 305, as amended, 25 U.S.C.A. §§ 1601 et seq., 1602, 1632, 1634.

8. Health and Environment ⇐25.5(5)

Bureau of Indian Affairs and Indian Health Service were subject to citizen suit under Resource Conservation and Recovery Act for contribution to open dumping on Indian reservation. Solid Waste Disposal Act, §§ 1002 et seq., 6004, 7002(a)(1)(B), as amended, 42 U.S.C.A. §§ 6901 et seq., 6964, 6972(a)(1)(B).

9. Indians ⇐32(1)

Indian tribe had duty under Resource Conservation and Recovery Act to bring open dump sites into compliance with Act and pertinent regulations and was responsible to prohibit open dumps on tribal lands. Solid Waste Disposal Act, §§ 1002 et seq., 1003(13)(A), (15), 7002, as amended, 42 U.S.C.A. §§ 6901 et seq., 6903(13)(A), (15), 6972.

Krista Clark, Dakota Plains Legal Services, Mission, S.D., for plaintiffs.

Marvin Amiotte, Pine Ridge, S.D., Ted L. McBride, Asst. U.S. Atty., Rapid City, S.D., Carl Strass, Environmental Defense Section, U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM OPINION AND ORDER

BATTEY, District Judge.

INTRODUCTION

Plaintiffs Taylor Wallace Blue Legs, administrator of the estate of Mattie Blue Legs, and Margaret Jenkins, have sued the Environmental Protection Agency (EPA), its Administrator Lee Thomas, the Bureau of Indian Affairs (BIA), the Indian Health Service (IHS), and the Oglala Sioux Tribe (OST), alleging that all are in violation of the provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, and the federal regulations applicable to it.

The Plaintiffs seek an injunction and declaratory relief requesting an order that all of the Defendants insure that the solid waste on the Pine Ridge Indian Reservation (Reservation) is disposed of in compliance with the Resource Conservation and Recovery Act (RCRA—the successor to the Solid Waste Disposal Act), 42 U.S.C. § 6901 *et seq.;* the Snyder Act, 25 U.S.C. § 13; the Indian Sanitation Facilities Act, 42 U.S.C. § 2004a; the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601 et seq.; and the federal government's trust responsibility.

This case is presently before the Court on cross motions for summary judgment by all of the parties.

STIPULATION OF FACTS

The parties have stipulated to the following facts:

1. Plaintiff, Mattie Blue Legs, now deceased, was a United States citizen of American Indian descent and an enrolled member of the Oglala Sioux Tribe.

2. Plaintiff, Margaret Jenkins, is a United States citizen of American Indian descent and an enrolled member of the Oglala Sioux Tribe.

3. Margaret Jenkins resides in Wanblee, South Dakota, approximately three miles from a solid waste disposal site that is located in Wanblee.

4. The present solid waste disposal facility at Wanblee is fenced and has a disposal pit. The facility at Wanblee was opened by the local tribal community. Wanblee, South Dakota, is within the exterior boundaries of the Pine Ridge Indian Reservation.

5. Solid waste disposal sites are also located in the towns of Kyle, South Dakota; Sharps Corner, South Dakota; Batesland, South Dakota; Porcupine, South Dakota; Manderson, South Dakota; Wounded Knee, South Dakota; Pine Ridge, South Dakota; and Oglala, South Dakota. Other solid waste disposal sites are located near the Evergreen and Wolf Creek housing sites on the Pine Ridge Indian Reservation and there is an old solid waste disposal site at Wanblee.

6. With the exception of the Batesland site, all of these solid waste disposal sites are located on lands of the Oglala Sioux Tribe and/or individual tribal members that are held in trust for the Tribe by the United States of America.

7. It is the position of BIA, IHS, and the Oglala Sioux Tribe (OST) that the Tribe, as the beneficial owner of lands held in trust by the United States, does not need a lease or permit from the BIA or IHS to use or occupy tribal trust lands for these purposes.

8. It is the position of the Plaintiffs that the Tribe cannot use its lands for these purposes without the consent of the BIA or IHS.

9. The Batesland site is fee land that is not held in trust by the United States of America.

10. Each of the solid waste disposal sites identified or referred to in paragraphs four through six and paragraph nine is located within the exterior boundaries of the Pine Ridge Indian Reservation.

11. Each of the solid waste disposal sites identified or referred to in paragraphs four through six and paragraph nine is operated in the manner of a "community open pit." None of these solid waste disposal sites is supervised. None, except the new Wanblee site, is fenced. Approximately half of the sites have a sanitary trench. Application of cover material is infrequent and irregular. All have scattered debris. Most of the sites are in the vicinity of or near one or more of the following: housing, schools, and streams or springs.

12. On or about December 14, 1976, the Oglala Sioux Tribal Council enacted a garbage and refuse disposal ordinance, Ordinance No. 76-14 which was denominated "[A]n ordinance for the regulation of garbage and refuse storage collection and disposal, for the promotion of health and control of disease." The ordinance pertains, among other things, to solid waste disposal and collection on the Pine Ridge Indian Reservation.

13. The Pine Ridge Village Garbage Service collects and disposes of solid waste generated by OST. The Pine Ridge Village is one of the communities of the Tribe.

14. Bureau of Indian Affairs (BIA) facilities on the Pine Ridge Indian Reservation consist of the Pine Ridge Agency, a few residences and/or school buildings.

15. BIA pays the Pine Ridge Village Garbage Service (PRVGS) to collect and dispose of solid waste generated by the Pine Ridge Agency on a month-to-month basis using a procurement contract or purchase orders for this service.

16. BIA maintenance personnel dispose of solid waste collected from the Crazy Horse Day School in Wanblee, the American Horse Day School, and government-owned quarters in Allen, South Dakota, and the Loneman Day School in Oglala by transporting the waste to the solid waste disposal facilities operated by the Tribe at Wanblee, Allen, and Oglala, respectively, and depositing it there.

17. The Indian Health Service (IHS) pays the Pine Ridge Village Garbage Service to collect solid wastes from IHS facilities at Pine Ridge, Wanblee, and Allen on a month-to-month basis using purchase orders. IHS facilities at Pine Ridge consist of the hospit[illegible] 47 homes, and the nurses' quarters. IHS facilities at Wanblee consist of the health center and seven housing units. IHS facilities at Allen consist of the health station. The PRVGS transports collected waste to the Pine Ridge and Wanblee dump sites (community open pits) for disposal.

18. IHS has an informal arrangement with the BIA contractors operating BIA contract schools in Porcupine and Loneman to collect solid waste from the IHS health stations in addition to the collections from the BIA schools and dispose of the solid waste at the Porcupine and Oglala dumps.

19. IHS health stations at Kyle and Manderson burn their solid wastes on site in open-topped 55-gallon drums.

20. IHS health facilities on the Reservation require IHS personnel to transport all infectious solid wastes to either the Pine Ridge Hospital or the Wanblee clinic for incineration.

21. OST has not entered into any contracts or agreements with the BIA or IHS or any other persons for the purpose of disposing of solid wastes generated by BIA or IHS on the Reservation.

22. BIA and IHS have not entered into any contracts or agreements with OST or each other for the purposes of disposing of solid wastes generated by BIA or IHS on the Reservation.

23. IHS does not authorize, license, or grant permits for the operation and maintenance of solid waste facilities on the Reservation.

24. Generally, IHS provides technical assistance to OST to assist the Tribe with its solid waste operation and maintenance responsibilities. Specifically, IHS provides technical assistance through IHS-employed engineers and sanitarians to Tribal Utility Organizations concerned with water, sewer, and solid wastes. The technical assistance is information and research by the engineers and sanitarians of the Environmental Health Program of IHS.

25. IHS has expended funds, under its authority in Pub.L. No. 86-121, 42 U.S.C. § 2004a, to obtain solid waste equipment for tribal use, to assist the Tribe in the development of solid waste ordinances for tribal adoption, to assist the Tribe in the development of solid waste plans for tribal implementation, and to assist the Tribe in the closing of dumps in response to requests for assistance from the Tribe or the submission of proposals by the Tribe.

Ind Sanitation Facilities Act

26. IHS does not supervise or assist in the operation and maintenance of the solid waste disposal facilities located on the Reservation, but assists the Tribe by taking the actions described in paragraph 25.

27. The Bureau of Indian Affairs, Pine Ridge Agency, has neither issued nor approved any leases or permits for dumpsites, sanitary landfills, or other "solid waste disposal facilities" on the Pine Ridge Indian Reservation during the period at issue in this litigation.

28. BIA does not supervise the Tribe's operation of solid waste disposal on the Reservation, but upon request from the Tribe, BIA provides technical assistance by providing general answers to technical

questions pertaining to site location and suitability or technical information in response to a specific inquiry and the short term loan of equipment as requested by OST.

29. BIA does not operate, supervise, or otherwise control operation of any of the "solid waste disposal facilities," "dumpsites," or "sanitary landfills" on the Pine Ridge Indian Reservation, but assists the Tribe by taking the actions described in paragraph 28.

30. The Environmental Protection Agency (EPA) does not authorize, license, or grant permits for the operation and maintenance of solid waste facilities on the Reservation.

31. EPA does not operate, supervise, or otherwise control operation or maintenance of any of the solid waste disposal facilities located on the Reservation.

ISSUES

One can see from these stipulated facts that there is no dispute that these dump sites are being maintained improperly. Each of the solid waste disposal sites is operated in the manner of a "community open pit" or "open dump." [1] None, except the new Wanblee site, are fenced. Approximately half of the sites have a sanitary trench. Application of cover material is infrequent and irregular. All have scattered debris. Most of the sites are in the vicinity of or near one or more of the following: housing, schools, and streams or springs. These sites are in an unsightly and unhealthy condition. The disputed issues in this case concern not so much who has caused these conditions, but who is responsible for changing them. Once having determined responsibility, the next question is whether the Plaintiffs have a remedy in this Court and if so, what might that be.

HISTORY AND PURPOSE OF THE SOLID WASTE DISPOSAL ACT

The Solid Waste Disposal Act, 42 U.S.C. §§ 3251–3259, was the first federal legislation dealing with solid waste management. The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 as an amendment to the Solid Waste Disposal Act. The Act contains separate titles: TITLE I, GENERAL PROVISIONS; TITLE II, OFFICE OF DISCARDED MATERIALS; AUTHORITIES OF THE ADMINISTRATOR; TITLE III, HAZARDOUS WASTE MANAGEMENT; TITLE IV, STATE OR REGIONAL DISCARDED MATERIALS PLANS; TITLE V, DUTIES OF THE SECRETARY OF COMMERCE IN RESOURCE AND RECOVERY; TITLE VI, FEDERAL RESPONSIBILITY; TITLE VII, MISCELLANEOUS PROVISIONS; AND TITLE VIII, RESEARCH, DEVELOPMENT, DEMONSTRATION, AND INFORMATION.

The legislation regarding the disposal of solid wastes was originally found at Pub.L. No. 89–272, Title II, Oct. 20, 1965, 79 Stat. 997, and codified at 42 U.S.C. Chapter 39 (§§ 3251–3259), known as the Solid Waste Disposal Act. In 1976 the chapter was amended, reorganized, and expanded by section 2 of Pub.L. No. 94–580, Oct. 21, 1976, 90 Stat. 2795, which is now found at 42 U.S.C. Chapter 82 (§§ 6901 *et seq.*). In 1984 amendments were added by Pub.L. No. 98–616, further extending the Act.

Congressional findings recognized with respect to solid waste were: (1) there have been ever-changing characteristics of the mass of material being discarded; (2) economic and population growth with its increase in the standard of living have required new construction, highways, and other transportation avenues resulting in a rising tide of scrap, discarded and waste materials; (3) population concentrations have presented the communities with financial, management, intergovernmental and technical problems; (4) while the collection and disposal of solid wastes should continue to be primarily the function of state, regional, and local agencies, the problems of waste disposal have become a matter national in scope. 42 U.S.C. § 6901.

---

[1] Congress has referred to an open dump as a land disposal site where discarded materials are deposited with little or no regard for pollution controls or aesthetics, where the wastes are left uncovered, and where frequently the use of the site for waste disposal is neither authorized nor supervised. The adverse impact of open dumping includes fire hazards, air pollution (including reduced visibility), explosive gas migration, surface ground water contamination, disease transfer (via vectors such as rats and flies, personal injury (to unauthorized scavengers), and aesthetic blight.) H.R. No. 94–1491 Part I (Pub.L. No. 94–580) 1976 U.S.Code & Admin. News 6238, 6275.

With respect to the environment and health, Congress was also concerned that (1) land is too valuable a national resource to be polluted by solid waste, most of which is disposed of on land in open dumps and sanitary landfills; (2) disposal of solid waste (and hazardous waste) without careful planning and management can present a danger to human health and environment; (3) as a result of the Clean Air Act (42 U.S.C. § 7401 *et seq.*) and other acts affecting health and environment, greater amounts of solid waste have been created. Similarly, unsound disposal practices have created an increased amount of air and water pollution along with other environmental health problems; (4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and land; (5) a greater degree of regulation is required in hazardous as opposed to nonhazardous solid waste. 42 U.S.C. § 6901.

RCRA was a multi-faceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8 percent annual increase in the volume of such waste. H.R. No. 94-1491—Part I (Pub.L. No. 94-580) 1976, U.S.Code Cong. & Admin.News 6239. Congress recognized that the words "discarded materials" [2] more accurately reflect its concerns because not only solid wastes, but also liquid and contained gaseous wastes, semi-solid wastes, and sludges were the subject of this legislation. *Id.* at 6240. The Congress was also concerned with the nation's consumption of domestic raw materials which could potentially result in future shortages. A third major concern was the health and safety of the population and the environment when exposed to toxic, lethal, or hazardous wastes. Unless hazardous wastes were properly managed in their disposal, they would present a clear danger to the health and safety of the population and to the quality of the environment. *Id.* at 6241.

Congressional encouragement of planning for future disposal of discarded materials under Title IV above may be contrasted with Congress's treatment of hazardous wastes under Title III of RCRA. With regard to hazardous wastes, Congress saw fit to adopt a regulatory approach. *Id.* at 6241-42. RCRA authorizes the EPA to undertake: (1) direct regulation of the generation, transportation, treatment, storage, and disposal of those solid wastes which qualify as hazardous wastes.[3] Therefore, whenever hazardous wastes are generated, the EPA has the unquestioned authority to implement a disposal program complying with the minimum federal standards. In comparison, RCRA's provision for nonhazardous discarded materials only authorizes "technical and financial assistance to state governments for the development of solid waste management plans." [4] Specific statutory treatment of discarded materials will be further discussed later in this opinion.

a. hazardous waste

Hazardous wastes are economically valueless, not susceptible of neutralization, present serious danger to human life and environment and can only be safely stored, treated, or disposed of at considerable cost. Because of the added costs of properly disposing of hazardous wastes, many competitive businesses would not voluntarily comply with suggested guidelines for the disposal of hazardous materials. Congress therefore adopted a regulatory framework, without which hazardous waste would continue to be disposed of in ponds, lagoons, or on the ground, resulting in substantial and sometimes irreversible pollution of the environment. *Id.* at 6241. Congress thus attempted to close its last remaining loophole in environmental law. In doing so, the regulatory, technical assistance, and planning functions were placed in the Environmental Protection Agency (EPA).

---

[2] Discarded materials is the term used to identify collectively those substances often referred to as industrial, municipal, or post-consumer waste, refuse, trash, garbage, and sludge. *Id.* at 6240.

[3] Subchapter III—Hazardous Waste Management, 42 U.S.C. §§ 6921-6934.

[4] Subchapter IV—State or Regional Solid Waste.

Enforcement of the terms of the Hazardous Waste Act is to be accomplished by federal and state inspections, compliance orders issued by the Administrator of the EPA and enforced in court with accompanying civil and criminal penalties. Congress intended that the Administrator, upon finding a violation of the provisions of the law, would be required to issue a notice to the violator which contained with reasonable specificity the nature of the violation, the time for compliance and the penalty for noncompliance. If the violation is not corrected within 30 days, then the Administrator can issue a compliance order or commence an action in district court.

b. discarded materials

Congress looked at the problems of the increasing amount of discarded materials and determined that some of these discarded materials could be recycled to recover some of the valuable energy or raw materials initially used to manufacture them. This would benefit the environment by reducing the volume of refuse and thereby protecting scarce land supply. *Id.* Additionally, the nation's importation of foreign energy and raw materials could be reduced by the substituting of recycled raw materials for virgin raw materials where appropriate. Useful employment could also be generated by the construction of needed waste management or recycling facilities. All these objectives could best be achieved through the implementation of discarded material planning.

With regard to discarded materials plans, Congress stated that the principal waste management tool currently used today is land disposal (despite the potential for environmental degradation from leachate). Congress recognized that the most effective approach for alleviating the problems created by discarded materials is a comprehensive discarded materials management approach by providing for studies, demonstrations, and dissemination of information on resource recovery, disposal, and resource conservation techniques. *Id.* at 6270. In order to encourage planning and coordination between local, regional, state, and interstate areas, this legislation offered technical and financial assistance to such units of government for discarded materials planning. *Id.* at 6271. Federal and technical aid was designed to be an incentive to such units of government to cooperate in the development of the proper areas and appropriate units of government to undertake the responsibility for development and implementation of the plan.

Simply stated, the discarded materials problem was looked upon as one of planning. Federal guidelines were to foster cooperation between the federal, state, and local governments and to meet the "very broad and flexible objectives of this act." The Committee report specifically stated:

> If those objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning.

Id. at 6271.

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

Pub.L. No. 94-580, 90 Stat. 2795, 42 U.S.C. §§ 6901-6987, known as the Resource Conservation and Recovery Act of 1976, was the first comprehensive federal legislation for waste management. The citizens suit provision of RCRA is found at 42 U.S.C. § 6972.[5] The Act contains a general prohibition against open dumping of solid waste.[6] After the passage of the Act it became subject to differing court interpretation. In *City of Gallatin v. Cherokee County*, 563 F.Supp. 940 (E.D.Tex.1983), Chief Judge Justice held that section 6945 did not directly prohibit open dumping. Accordingly, he held that a state was not required to prohibit open dumping unless it has sought federal funds and its plan for solid waste disposal had been approved by the EPA and even so, no citizens suit would lie against the owner or operator of an open dump.

---

[5] § 6972. Citizens suits
(a) In general
Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of

In *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642 (E.D.Pa.1981), Judge Pollak reached a contrary result and in support of his decision citing the view of the EPA in regulation 44 Fed.Reg. 45066, 45072 (1979) which stated in part as follows:

> The open dumping prohibition is a provision of federal law which stands on its own, separate from the State planning programs. In conjunction with the citizens suit provision, the open dumping prohibition creates a Federal cause of action allowing citizens and States to seek relief in Federal court for damaging solid waste management practices.

O'Leary was followed in *Jones v. Inmont Corp.*, 584 F.Supp. 1425 (1984), where Judge Spiegel held that section 6945 was not merely an enabling provision al-

---

any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court of the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (a)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

[6] § 6945. Upgrading of open dumps

(a) Closing or upgrading of existing open dumps

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State which are open dumps listed in the inventory under subsection (b) of this section shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards. Each such plan shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule for compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with the prohibition on open dumping of solid waste within a reasonable time (not to exceed 5 years from the date of publication of criteria under section 6907(a)(3) of this title).

(b) Inventory

To assist the States in complying with section 6943(a)(3) of this title, not later than one year after promulgation of regulations under section 6944 of this title, the Administrator, with the cooperation of the Bureau of the Census shall publish an inventory of all disposal facilities or sites in the United States which are open dumps within the meaning of this chapter.

lowing the promulgation of regulations but also contained a prohibition against open dumping when it stated, "Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited. . . ."

Later that year Congress expressly overruled the holding in *City of Gallatin*. The legislative history to Pub.L. No. 98-616 stated:

> This opinion [City of Gallatin] misinterprets Section 4005(a) [42 U.S.C. § 6945]. In enacting this provision, it was Congress's intent that the open dumping prohibition go into effect upon promulgation of EPA regulations under section 1008(a)(3) [42 U.S.C. § 6907] defining open dumping, and that the prohibition be defined on the basis of these regulations. It was also Congress's intent that persons seeking to enforce the opening dumping prohibition bring suit—not against the Federal government or the state—but against persons engaged in the act of open dumping and that the Federal District Courts be authorized to enjoin such persons directly although the Committee believes that Congress's intent is clear on the face of the statute. In light of the *City of Gallatin* decision the Committee is amending Section 4005(a) (and 7002(a)(1)) to further emphasize and clarify its original intent. 1984 U.S.Code Cong. & Admin.News 5576, 5612-13.

jurisd'n

The 1984 amendment to the Act provided an extension into the enforcement area by providing specifically for the prohibition of open dumping. The amendment added the provision, "The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping." 42 U.S.C. § 6945.

The 1984 amendment added a new paragraph to section 6972. Subsection (a)(1)(B) was added by Pub.L. No. 98-616, § 401(a)(3) which is set forth under footnote 5 of this opinion.

The sum total of these decisions and the legislative changes is that Congress intended to provide a broad plan for the resolution of the nation's problems with hazardous and non-hazardous waste.

OGLALA SIOUX TRIBE

[1] The Court finds that it has jurisdiction to enforce the provisions of the RCRA concerning the prohibition of open dumps against the Oglala Sioux Tribe. OST has the responsibility to regulate, operate, and maintain the dumps on the Reservation. This responsibility stems from the inherent sovereignty which Indian tribes possess.

[2] Under the statute the term "person"[7] is defined as including a "municipality." "Municipality"[8] is defined by statute to mean "an Indian tribe or authorized tribal organization." These definitions, along with the provisions for citizens suits, indicate Congressional intent to subject tribes to suit under section 6972.

tribal agency
as OST

Had Congress not explicitly intended RCRA to apply to the Indian communities, this Court would find that it impliedly intended its application. Such interpretation would be entirely consistent with the concept of Indian sovereignty. Indian people are no less subject to the hazards addressed by RCRA than other people. Surely they are entitled to the same Congressional concern over the health of the citizens as anyone else. In that portion of House Report 94-1491, 94th Congress 2d Session 1976, concerning open dumps, the report said that a study of solid waste management practices on Indian reservations in 1970 found open dumping common. Further, U.S. Public Health physicians reported treating large numbers of cuts and punctures received by Indian children playing in the dumps. 1976 U.S.Code Cong. & Admin.News 6238, 6275.

---

[7] 42 U.S.C. § 6903(15) reads: "The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body."

[8] 42 U.S.C. § 6903(13 A) reads: "The term 'municipality' (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska native village or organization. . . ."

A recent Ninth Circuit case addressed the issue of jurisdiction over Indians under the RCRA. In *State of Washington, Dept. of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465 (9th Cir.1985), the issue was state versus federal jurisdiction under the RCRA statutes. RCRA permits states to develop and implement state hazardous waste programs in lieu of the federal program. The state of Washington applied for a state plan, including plans for Indian land in the state. EPA refused the permit for the Indian land, but approved the permit for the rest of the state. The issue in the court of appeals was whether EPA violated the requirements of RCRA when it refused to permit Washington to apply its state hazardous waste regulations to the activities of all persons on Indian lands.

EPA studied the plan and concluded that the state had not adequately demonstrated its authority to exercise jurisdiction. The court agreed, noting that the RCRA requirements apply to all persons, including Indian tribes, but that RCRA statutes do not directly address how hazardous waste management programs should be implemented on reservations. *Id.* at 1466, 1469. Noting that the only mention of Indians is in section 6903(13), the court stated:

Wash EPA
re juris
over OST

> [T]he reference indicates only that the tribes are regulated entities under the RCRA. since "municipality" is included within the statutory definition of "person" [citation omitted] and the enforcement provision of these statutes apply to "any person" [citation omitted].

Id. at 1469.

The *Washington* case established, and this Court agrees, that Indian tribes are regulated entities under RCRA. If the tribes are regulated entities, then they should be subject to citizens suits if a plaintiff makes allegations which fall within one of the categories of section 6972(a)(1)(A) or (B).

The OST itself has acknowledged its tribal sovereignty over tribal lands, as well as its responsibility to regulate, operate, and maintain the dumps on the reservation.

It is not disputed that the OST "enacted a garbage and refuse disposal ordinance which is designed to regulate the storage, collection, and disposal of garbage and refuse for the promotion of health and control of disease." (S. 12). The OST participates in open dumping and enters into contracts which involves it in the management of the dumps. (S. 13).

Although the OST and the federal defendants advance the theory of sovereign immunity, each does so in different context. OST would have this Court apply the doctrine so as to bar this action and require resolution of the matter by the OST tribal court. The federal defendants apply the doctrine so as to convince the Court that the responsibility for compliance with RCRA is with the Tribe and not with them.

[3, 4] This Court holds that RCRA is a preemption upon the sovereignty of the OST. While no useful purpose would be served by a recitation of the judicial history, it is important to point out that the Indian tribes still possess their inherent sovereignty, except where it has been specifically taken from them either by treaty or by Congressional act. *Iron Crow v. Oglala Sioux Tribe of Pine Ridge*, 231 F.2d 89 (8th Cir.1956). *See also Indian Rights and the Federal Courts*, 24 Minn.L. Rev. 145, 147 (1940) by Felix Cohen, where the author stated, "With inherent sovereignty, at least in certain areas, tribal actions are lawful unless their validity is limited by the United States Constitution or federal statutes."

Under the facts of this case, the dump sites are not under lease. They are operated subject to the control of the Tribe. Pursuant to the duty to manage the open dumps, the Tribe has enacted a garbage and refuse disposal ordinance. The ordinance is entitled, "An Ordinance for the Regulation of Garbage and Refuse Storage

Collection and Disposal for the Promotion of Health and Control of Disease."

Further, the OST authorized the issuance of permits for dumping from an adjunct association known as the Pine Ridge Sanitation Maintenance Service. The purpose of this association is "to carry on the business of operating and maintaining ... all Sanitary Facilities built or maintained by or for the Oglala Sioux Tribe or its members within the boundaries of the Pine Ridge Indian Reservation." Article II, Articles of Association and Bylaws of Pine Ridge Sanitation and Maintenance Service.

It is clear from the provisions of the Oglala Sioux Tribe Garbage and Refuse Disposal Ordinance that the governing body of the OST has both the responsibility for the collection and disposal of solid wastes on the Reservation and the responsibility under its own law for maintaining the solid waste disposal sites on the Reservation.

Accordingly, this Court finds that the OST is subject to the application of RCRA.

EPA RESPONSIBILITY

[5] Under RCRA, the EPA does not have the Congressionally granted authority over open dumping under Title IV relating to discarded materials that it has under Title III relating to hazardous waste. Indeed, absent specifically enumerated powers, any enforcement encroachment into open dumping on the Pine Ridge Indian Reservation would be a violation of the inherent sovereignty of the Oglala Sioux Tribe. The solution to open dumping on the Reservation is best left to the Indian people themselves through enforcement of tribal ordinances enacted by the duly elected tribal council. The council itself must recognize and then deal with this hazard to the health and welfare of the Indian people and the destruction to the environment in which its people live. The unsightly and unhealthy conditions will diminish in direct proportion to the amount of pride in their communities which the council and the tribal members maintain.

EPA, however, has some responsibility in solving the problem. Specifically, RCRA required EPA to issue certain guidelines and criteria for solid waste management to assist states and local governments and regions in their solid waste planning. EPA has promulgated those regulations and guidelines at 40 C.F.R. § 257. RCRA further authorizes EPA to provide technical and financial assistance in order to implement solid waste management regulations on the Reservation.

The regulations set forth that the Indians are treated the same as any other municipality. It reads as follows:

> Major Federal facilities and Native American Reservations should be treated for the purpose of these guidelines as though they are incorporated municipalities, and the facility director or administrator should be considered the same as a locally elected official.

40 C.F.R. § 255.33.

The guidelines referred to are those in 40 C.F.R. § 255 for the identification of regions and agencies for solid waste management. The "administrator" referred to means the administrator of the federal facility or reservation, such as a tribal council chairman or a designated representative.[9]

BUREAU OF INDIAN AFFAIRS AND INDIAN HEALTH SERVICE

It is the Plaintiffs' position that the federal defendants Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) are in violation of the provisions of RCRA, specifically 42 U.S.C. §§ 6964(a)(1)(A) and 6964(a)(3), because they have "jurisdiction over the PRIR and allow land held in trust by the United States to be used as open dumps...."

The Plaintiffs concede, however, that they point to no specific statutory authorization except 42 U.S.C. §§ 6964(a)(1)(A)[10] and 6964(a)(3)[11]. The Court has not been favored with any case authority on point, nor can the Court find such authority. The legislative history is at best not helpful as shown by the prior discussion herein.

---

[9] When the term Administrator is used in the regulations to indicate the Administrator of EPA, the term is always capitalized. *See, e.g.*, 40 C.F.R. §§ 260.20–260.22.

[10] § 6964. Applicability of solid waste disposal guidelines to Executive agencies.

[6] Hardly can a court construe RCRA to contain a broad jurisdictional grant of power to the BIA and IHS to administer open dumping on the Reservation. Such a construction would fly in the face of the authorities and discussion pertaining to tribal sovereignty and otherwise would be a legislative construction not called for by the four corners of the Act.

Plaintiffs rely upon *McNabb v. Heckler*, 628 F.Supp. 544, 547–549 (D.Mont.1986) and *White v. Califano*, 437 F.Supp. 543 (D.S.D.1977), *aff'd* 581 F.2d 697 (8th Cir. 1978) to support the argument requesting this Court to extend the jurisdiction of the IHS and BIA to manage dumps on the Reservation. By analogy to *McNabb* and *White*, the Plaintiffs would extend the well-recognized trust responsibility of the federal government to the Indian tribes to that of "do[ing] more than it does now to see that the dumpsites on the PRIR conform to the provisions of RCRA...." The problem with adopting the reasoning of *White* and *McNabb* is that RCRA contains no specific authorization to do what the Plaintiffs would have the court do.

In *White*, the law was clear that the trust responsibility of the federal government in relation to Indian tribes in the area of health services was explicitly mandated by the Indian Health Care Improvement Act (IHCIA) and the law then in existence. There the district court quite properly held that the Indian Health Service had a responsibility to care for a mentally ill member of an Indian tribe.

In *McNabb*, the issue was whether the federal government had the burden to pay for the medical expenses accrued by an Indian child as opposed to the claim that the obligation for payment rested with Roosevelt County, Montana, the county of the residence of the child, and therefore, the responsible county under Title 53, Chapter 3, Montana Code Annotated. *McNabb* followed *White* on the basis that a clear duty existed under the Snyder Act, 25 U.S.C. § 13 and the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*

White and *McNabb* therefore furnish no authority for the Plaintiffs' position. The primary duty for the enforcement of RCRA is with the Tribe. This is not to say that the BIA and IHS do not have a role in providing assistance to the OST. The federal defendants must stand ready to assume their statutorily mandated duty with respect to the Indian communities of the Pine Ridge Indian Reservation.

The Indian Health Care Improvement Act (IHCIA) is an act intended to mandate the federal government's commitment to improve Indian health care. 25 U.S.C. § 1602. It authorizes appropriations for the construction of safe sanitary disposal facilities. *Id.*, sections 1632 and 1634.

[7] Plaintiffs also contend that both the BIA and IHS have a duty to administer solid waste management activities under the RCRA provision regarding "federal responsibility." 42 U.S.C. § 6964 provides:

> (1) If (A) an executive agency (now as defined in Section 105 of Title 5) or any unit of the legislative branch of the Federal Government has jurisdiction over any real property or facility, the operation or administration of which involves such agency in solid waste management activities ... then such agency shall ensure compliance with the guidelines recommended under Section 6907 of this title and the purposes of this chapter in

---

(a) Compliance

(1) If—

(A) an Executive agency (as defined in section 105 of Title 5) or any unit of the legislative branch of the Federal Government has jurisdiction over any real property or facility the operation or administration of which involves such agency in solid waste management activities....

[11] § 6964. Applicability of solid waste disposal guidelines to Executive agencies.

(a) Compliance

(3) Each Executive agency which permits the use of Federal property for purposes of disposal of solid waste shall insure compliance with such guidelines and the purposes of this chapter in the disposal of such waste.

> the operation or administration of such property or facility.

This Court believes that a plain reading of the statute is broad enough to bring the BIA and the IHS under its umbrella. The fact that the BIA and IHS utilize some of the sites for the purpose of dumping is relevant upon the Congressional intent that open dumping is to be prohibited by executive agencies under the statute. Thus the Court finds that the BIA and IHS are required to comply with RCRA § 6964.

Although the BIA and IHS are found by this Court to not have broad jurisdictional authority over the Reservation, this Court does find that they may not continue to contribute toward open dumping on the Reservation.

BIA dumping

The facts show that the BIA facilities on the Reservation consist of the Pine Ridge Agency, a few residences and/or school buildings; that it participates by paying the Pine Ridge Garbage Service to collect and dispose of solid waste (which is, of course, deposited in the open dumps); that its maintenance personnel dispose of solid waste collected from the Crazy Horse Day School and government quarters in Allen, and the Loneman Day School in Oglala by transporting the waste to the solid waste disposal facilities operated by the Tribe at Wanblee, Allen, and Oglala.

IHS dumping

With respect to the IHS, the facts show that the IHS pays the Pine Ridge Garbage Service to collect solid waste from IHS facilities at Pine Ridge, Wanblee, and Allen on a month-to-month basis; that the IHS facilities consist of a hospital, 47 homes and nurses' quarters and a health station at Allen; that the waste is transported to the Pine Ridge and Wanblee dump sites; that the BIA contractors collect waste from schools in Porcupine and Loneman which is deposited at the Porcupine and Oglala dump sites; IHS health stations at Kyle and Manderson burn their solid waste on site in open-topped 55-gallon drums and IHS health facilities require its personnel to incinerate infectious solid waste at the Pine Ridge Hospital or the Wanblee clinic.

[8] Thus, the contribution by the BIA and the IHS to the problem of open dumping on the Reservation can hardly be said to be *de minimus*. Accordingly, while the Court finds that RCRA does not provide authority to *manage* open dumping, nevertheless, the BIA and IHS are in violation of the provisions of section 6964 and thus are subject to citizens suits under section 6972(a)(1)(B).

CONCLUSION

The EPA has performed all duties required of it pursuant to the statutes and regulations. No standards exist by which this Court can define additional nondiscretionary acts which must be performed by the EPA. Accordingly, Defendant EPA's motion for summary judgment is granted in favor of the Administrator and the Agency.

This Court finds that the Defendants BIA and IHS are in violation of RCRA as it applies to the prohibition of open dumping on the Pine Ridge Indian Reservation. Summary judgment against the BIA and IHS is granted.

[9] With respect to the Oglala Sioux Tribe, it is held that it is responsible under RCRA for seeing that open dumps do not exist on tribal lands. The OST has received federal funds in the past through the IHS and BIA as financial assistance for the maintenance and operation of these dump sites. The OST has control over the disposal of solid wastes on the Reservation, both under federal law and under the tribe's own law, and the tribe has a duty to its people to see that these laws are complied with. The Court finds that the OST has a federal statutory responsibility to bring the dump sites into compliance with RCRA and the pertinent regulations. Summary judgment against the OST is granted.

The Court requires the OST, BIA, and IHS to submit a plan to the Administrator of the EPA and this Court within 120 days setting forth a plan including the steps to be taken to bring the dump sites into compliance. Upon the approval and implementation of such plan, the Administrator shall issue an order of compliance. This Court withholds the issuance of any injunctive relief subject to the receipt of the plan within 120 days. Any orders issued by the Administrator for the protection of the public health and environment of the Pine Ridge Indian Reservation shall be subject to enforcement by this Court under the provisions of 42 U.S.C. § 6973 providing for a fine of not more than $5,000 for each day in which such violation occurs, or such failure to comply continues.

The Court shall maintain jurisdiction of the case for the purpose of receiving the 120 day plan of OST to comply with the federal regulations of RCRA.

ORDER

For the reasons given in the opinion, it is now

ORDERED that the Oglala Sioux Tribe, Bureau of Indian Affairs, and the Indian Health Service shall file with the Clerk of this Court and with the Administrator of the EPA on or before 120 days from this date, a plan by which it is proposed to change or modify the conditions of the open dump sites on the Reservation to bring them into compliance with RCRA and such measures promulgated by the Administrator of the EPA at 40 C.F.R. § 257 for the purpose of eliminating current health and environmental hazards and minimizing future potential hazards on the Pine Ridge Indian Reservation. Upon such approval of the plan by the EPA, or in the event of a failure to approve the plan by the EPA, the Administrator shall issue such orders as may be necessary to bring such sites into compliance.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this case and all parties pending receipt and implementation of the plan to be submitted.

Calvin L. GUY, Plaintiff,

v.

The CITY OF PHOENIX, et al., Defendants.

No. CIV-83-2240 PHX. WPC.

United States District Court,
D. Arizona.

May 5, 1987.

Black police officer brought civil rights action against city for racial harassment. The District Court, Copple, J., held that: (1) black police officer failed to establish that his supervisors or city were liable in § 1983 civil rights action for alleged racial harassment, and (2) black police officer failed to establish city or supervisors were liable under § 1981 for racial harassment.

Ordered accordingly.

1. Civil Rights ⇐13.3(1), 13.5(1)

Before prima facie case of discrimination can be established under § 1983, there must be conduct by someone acting under color of state law, and conduct must deprive plaintiff of right secured by the Constitution or the law of the United States. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.13(3)

Black police officer failed to establish that alleged acts of racial harassment by fellow police officers were carried out under color of state law, and thus black police officer failed to establish prima facie case of discrimination under § 1983; acts of police officers were in no way related to performance of their duties as police officers. 42 U.S.C.A. § 1983.

3. Civil Rights ⇐13.1

Section 1983 does not create any substantive rights; rather, it merely provides for deprivation of rights established elsewhere.

4. Civil Rights ⇐13.7

Before municipal liability may be established under § 1983 against city, plain-

ENVIRONMENTAL PROTECTION AGENCY INDIAN POLICY AND RECENT LEGISLATIVE DEVELOPMENTS

By

Eric D. Eberhard

Minority Staff Director and Counsel

Senate Select Committee on Indian Affairs

Washington, D.C.

Paper 15

Biographical Sketch

Eric D. Eberhard

Eric D. Eberhard is an attorney employed by the Senate Select Committee on Indian Affairs as the Minority Staff Director and Counsel. He received his B.A. degree from Western Reserve University in 1967 with a major in political science. In 1970 he received a J.D. degree from the University of Cincinnati and in 1972 was awarded an LL.M degree from George Washington University. He has been actively engaged in the practice of Indian affairs since 1973. His practice has involved all aspects of the representation of Indian Tribes and individuals in federal, state and tribal forums. As the Deputy Attorney General of the Navajo Nation from 1983 to 1985 and Executive Director of the Navajo Nation Washington Office from 1985 to 1987 he was involved in the development and passage of Indian amendments to the Clean Water Act, Safe Drinking Water Act and Superfund.

ENVIRONMENTAL PROTECTION AGENCY INDIAN POLICY

AND

RECENT LEGISLATIVE DEVELOPMENTS

Eric D. Eberhard
Minority Staff Director and Counsel
Senate Select Committee on Indian Affairs
Washington, D.C.

I. Introduction

This paper is intended to provide an overview of the implementation and application of federal environmental laws on Indian lands. Indian tribes possess a unique status in the American constitutional system.[1] In general, tribes are not subject to state authority,[2] but are subject to the plenary power of Congress.[3] Tribes derive their sovereign authority from sources which pre-date the U.S. Constitution,[4] and have retained inherent sovereign powers subject only to limitation or divestment by the Congress.[5]

For the most part, the early federal environmental statutes did not address the question of the role to be played by tribal governments.[6] While all of the statutes were, at least arguably, applicable to Indian lands,[7] EPA was left without specific statutory authority for the delegation of programs to tribes and the enforcement of standards on Indian lands. Against this backdrop, the federal courts were called upon to resolve assertions of state authority to enforce environmental laws on Indian lands.

---

[1] U.S. Const. art. I, §8, cl. 3; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[2] United States v. John, 437 U.S. 634 (1978); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S.164 (1973).

[3] Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 57 (1946).

[4] United States v. Wheeler, 435 U.S. 313, 323-24 (1978).

[5] Bryan v. Itasca County, 426 U.S. 373 (1976); Menominee Tribe v. United States, 391 U.S. 404 (1968).

[6] See, for example, P.L. 88-206, December 17, 1963 (Clean Air); P.L. 92-500, October 18, 1972 (Clean Water); and P.L. 94-469, October 11, 1976 (Toxic Substances).

II. Federal Case Law

The first federal judicial review of the appropriate roles for tribes, states and EPA came in the case of Nance v. EPA.[8] Pursuant to Section 107(a)[9] of the Clean Air Act, states were authorized to designate air quality regions. No provision of the Act provided similar authority for the tribes.[10] In 1974, EPA promulgated regulations governing the redesignation of air quality regions, including a provision by which a tribal government could redesignate its reservation. In 1976, the Northern Cheyenne Tribe proposed a Class I designation for its reservation. After completing the necessary studies and hearings, the Tribe submitted its formal proposal to EPA on March 7, 1977. On August 5, 1977 EPA formally approved the Class I designation by publication in the Federal Register. In the ensuing litigation, the federal courts were asked to find that EPA had acted arbitrarily and capriciously by delegating redesignation authority to tribes because Section 107(a) delegated the responsibility to the States "for assuring air quality within the entire geographic area comprising the state."[11]

The Ninth Circuit expressly found that EPA's actions were not arbitrary or capricious.[12] In doing so, the Court held that:

> The Indian tribes have traditionally been regarded as possessing important

---

[7] Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

[8] 645 F.2d 701 (9th Cir. 1981).

[9] 42 U.S.C. §7404(a) (1988).

[10] P.L. 95-95, The Clean Air Act Amendments of 1977, was signed on August 7, 1977 and contained provisions explicitly authorizing Tribes to designate air quality on reservations. See page 15-19 infra.

[11] 42 U.S.C. 7404(a) (1988).

[12] 645 F.2d at 704.

> attributes of sovereignty and the power of the states to regulate Indians and Indian lands has been sharply curtailed... As this Court stated in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658 (9th Cir. 1975), 'we have little doubt that Congress assumed and intended that states had no power to regulate the Indians use or governance of the reservation provided, except as Congress chose to grant that power'... . And it is well recognized that Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or Act of Congress.[13]

Subsequent to Nance, the Ninth Circuit was called upon to determine the authority of the State of Washington to enforce the Resource Conservation and Recovery Act (RCRA) on Indian lands in the case of Washington Department of Ecology v. EPA.[14] Section 3006 of RCRA authorizes the states to establish hazardous waste management programs "in lieu of" the federal program administered by EPA.[15] The State of Washington submitted an application to EPA to assume primary enforcement responsibility for RCRA, including enforcement on Indian lands within the State. EPA approved the application "except as to Indian lands," where EPA retained enforcement authority.[16]

The Ninth Circuit found that RCRA was ambiguous with regard to State authority to regulate on Indian lands.[17] The Court held that EPA's interpretation of RCRA was both reasonable and entitled to deference.[18] In doing so, the Court explicitly found that the "States are generally precluded from exercising jurisdiction over Indians in Indian Country unless Congress has clearly expressed an intention to permit it."[19] EPA's interpretation of the statute was found to be consistent with the federal trust responsibility and the federal policy of encouraging tribal self-government.[20]

---

[13] 645 F.2d at 713 (some citations omitted).

[14] 752 F.2d at 1465 (9th Cir. 1985).

[15] 42 U.S.C. §6926(b) (1988).

[16] 48 Fed. Reg. 34954, 34957 (1983).

[17] 752 F.2d at 1469.

[18] Id.

> ...the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling. We cannot say that RCRA clearly evinces a Congressional purpose to revise federal Indian policy or diminish the independence of Indian tribes.... We therefore conclude that EPA correctly interpreted RCRA in rejecting Washington's application to regulate all hazardous waste-related activities on Indian lands. We recognize the vital interest of the State of Washington in effective hazardous waste management throughout the state including on Indian lands. The absence of state enforcement power over reservation Indians, however, does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations.[21]

Several important generalizations may be drawn from the Nance and Washington cases:

- EPA and the tribes are primarily responsible for regulation of the environment on reservation lands.

- Even without express statutory authority, EPA may delegate responsibilities to tribes.

- Inherent tribal sovereignty confers on the tribes sufficient authority to regulate the reservation environment.

---

[19] 752 F.2d at 1469-1470.

[20] Id. at 1470-1471.

[21] 752 F.2d at 1472. The Court left open the question of state authority over non-Indians within Indian country. Id. at 1468.

- Absent express approval of the Congress, the states do not have the authority to regulate reservation environments.
- Federal environmental laws and standards apply to Indian lands.

III. The EPA Indian Policy

On January 24, 1983 President Reagan issued an Indian policy statement in which he called for a continuation of the federal policy of promoting tribal self-government and pledged to work directly with tribes in a "government-to-government" relationship.[22] EPA Administrator William Ruckelshaus promulgated an EPA Indian policy on November 8, 1984 to implement the President's policy.[23] In pertinent part, the EPA policy provides:

> In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to tribal interests in making agency policy, and to insure the close involvement of tribal governments in making decisions and managing environmental programs affecting Indian lands. To meet this objective, the Agency will pursue the following principles:
>
> 1. The Agency stands ready to work directly with Indian tribal governments on a one-on-one basis (the government-to-government relationship), rather than as subdivisions of other governments.
>
> ....

---

[22] Pres. Reagan Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983).

[23] "EPA Policy for the Implementation of Environmental Programs on Indian Lands, William D. Ruckelshaus, Administrator," Nov. 8, 1984. The full text of the EPA Indian Policy and Implementation Guidance are found at Appendix A.

2. The Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.

....

3. The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.

....

4. The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.

....

5. The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.

.....

6. The Agency will encourage cooperation between tribal, state and local governments to resolve environmental problems of mutual concern.

....

7. The Agency will work with other federal agencies which have related responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations.

....

> 8. The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.
>
> ....
>
> 9. The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.[24]
>
> ....

The Implementation Guidance[25] which accompanied the EPA Indian Policy directed the Assistant Administrator for External Affairs to coordinate the implementation of the policy. The Indian Work Group (IWG), chaired by the Director of the Office of Federal Activities, was directed to assist and support the Assistant Administrator for External Affairs in the development of guidance to implement the policy. The IWG was also directed to "develop recommendations and suggest priorities for specific opportunities for program implementation...."[26] Assistant and Regional Administrators were directed to undertake "active outreach and liaison" with tribes,[27] and to allocate resources to meet tribal needs.[28] Tribal governments were to be assisted in program development in the same manner as the states had been assisted.[29] Administrators were directed to take "active steps" to allow tribes to provide "informed" input into EPA decisions and activities affecting reservation environments.[30] Tribal "concerns, needs and preferences" were to be incorporated to the "maximum feasible extent" into decisions and activities affecting reservations.[31] EPA Administrators and the general counsel were directed to work cooperatively with tribal governments, "consistent with the principle of Indian self-government" to achieve compliance with regulations and statutes.[32] Administrators and the general counsel were directed to begin to factor Indian policy goals into their planning and management activities, "including budget, operating guidance, management accountability systems and performance standards."[33]

---

[24] Id.

[25] "Indian Policy Implementation Guidance," Alvin L. Alm, Deputy Administrator, Nov. 8, 1984.

[26] Id. at 3.

[27] Id. at 4.

[28] Id.

[29] Id. at 5.

[30] Id. (Emphasis original).

To effectuate the Indian Policy, the EPA regional offices began efforts in Fiscal Years 1984 and 1985 to assist tribes with the implementation of the Clean Water Act, Clean Air Act, Safe Drinking Water Act, the Resource Conservation and Recovery Act and the Federal Insecticide, Fungicide, and Rodenticide Act on reservation lands.[34] Typical activities targeted for funding included: technical assistance and training; hazardous waste remedial actions; waste water treatment systems; public water system monitoring; air quality monitoring and pesticide applicator certification.[35] Overall, EPA estimated that $5.7 million was expended on these efforts in FY '85.[36]

For FY '86, EPA reported that it expended $2.9 million in similar activities on Indian lands.[37] The agency also indicated that it was actively "seeking amendments to environmental statutes in order to clarify the role of tribal governments... ."[38]

---

[31] Id.

[32] Id. at 6.

[33] Id. at 7.

[34] EPA, "Environmental Programs on Indian Reservations-FY '85," Office of External Affairs, Office of Federal Activities, Nov. 1985.

[35] Id. passim.

[36] Id. at 3.

[37] EPA, "FY '86 Environmental Activities on Indian Reservations," Office of Federal Activities, May, 1987. EPA attributed the apparent decline in funding from FY '85 to the fact that the figures for FY '85 had apparently included funds expended during both FY '84 and '85 and a decline in construction of wastewater treatment facilities. Id. at 3.

IV. Statutory Provisions Relating to Environmental Regulation

As noted above, the federal environmental regulatory statutes initially did not provide for the delegation of primary enforcement responsibility to tribal governments. To the extent that tribes were included at all, they were often characterized as municipalities.[39] In 1984, representatives of tribal governments began working with Congress and EPA to develop Indian amendments to the Safe Drinking Water Act,[40] the Clean Water Act[41] and CERCLA.[42]

A. The Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) was amended in 1986 to allow tribes to be treated as states.[43] The Act now provides as follows:

> § 300j-11. Indian Tribes
>
> (a) In general
>
> Subject to the provisions of subsection (b) of this section, the Administrator--
>
> (1) is authorized to treat Indian tribes as states under this subchapter,
>
> (2) may delegate to such tribes primary enforcement responsibility for public water systems and for underground injection control, and

---

[38] Id. at 2.

[39] 42 U.S.C. §300f(10) (Safe Drinking Water Act) and 42 U.S.C. §6903(13) (Resource Conservation and Recovery Act.

[40] 42 U.S.C. §300j-11 (1988).

[41] 33 U.S.C. §1377 (1988).

[42] 42 U.S.C. §9626 (1988).

[43] 33 U.S.C. §300j-11 (1988).

(3) may provide such tribes grants and contract assistance to carry out functions provided by this subchapter.

(b) EPA regulations

(1) Specific provisions

The Administrator shall, within 18 months after June 19, 1986, promulgate final regulations specifying those provisions of this subchapter for which it is appropriate to treat Indian tribes as states. Such treatment shall be authorized only if:

(A) the Indian tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe are within the area of the tribal government's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations.

(2) Provisions where treatment as state is inappropriate

For any provision of this subchapter where treatment of Indian tribes as identical to states is inappropriate, administratively infeasible or otherwise inconsistent with the purposes of this subchapter, the Administrator may include in the regulations promulgated under this section, other means for administering such provisions in a manner that will achieve the purpose of the provision. Nothing in this section shall be construed to allow Indian tribes to assume or maintain primary enforcement responsibility for public water systems or for underground injection control in a manner less protective of the health of

> persons than such responsibility may be assumed or maintained by a state. An Indian tribe shall not be required to exercise criminal enforcement jurisdiction for purposes of complying with the preceding sentence.

Other provisions of the Indian amendment authorized tribes to assume primary enforcement responsibility for underground injection control activities[44] and waived all time requirements for assumption of regulatory primacy.[45] EPA was also authorized to provide technical assistance funds to public water systems owned or operated by tribes "to enable such systems to achieve and maintain compliance with national drinking water regulations."[46] In conjunction with the Indian Health Service, EPA was directed to conduct a survey of drinking water on Indian reservations and the need for alternative supplies.[47]

On September 26, 1988 EPA promulgated final regulations to implement the statutory provisions for the public water system and underground injection control programs.[48] The regulations establish procedures for tribes to apply for "treatment as a state." Once EPA has determined that a tribe is eligible for treatment as a state, development grants will be extended by EPA to enable the tribe to prepare to assume regulatory primacy. For the public water system program, development grants may be made for up to three years.[49] For the underground injection control program, development grants may be made for up to four years.[50]

---

[44] 42 U.S.C. §300h-1(e) (1988).

[45] 42 U.S.C. §300j-2(a) 2 (B) and (b)(2) (1988).

[46] 42 U.S.C. §300j-1(g) (1988). Up to ten million dollars per year was authorized for this purpose. Of this amount, the greater of 3% or $280,000 was set aside for tribes. Id.

[47] P.L. 99-339, Sec. 302(e); 100 Stat. 666 (June 19, 1986). EPA did complete a report during November, 1987 under a contract with Science Applications International Corporation of McLean, Virginia. EPA Contract No. 68-01-3348. The report was submitted to the EPA Office of Drinking Water, but apparently was never submitted to the Congress by EPA.

[48] 53 Fed. Reg. 3738 (Sept. 26, 1988).

[49] 40 C.F.R. §35.415(a)(2) (1988).

B. The Clean Water Act

On February 4, 1987 the Clean Water Act was amended to allow tribes to be treated as states for certain purposes.[51] The Act now provides as follows:

> §1377. Indian tribes
>
> (a) Policy
>
> Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as states for purposes of such section 1251(g) of this title.[52]
>
> (b) Assessment of sewage treatment needs; report
>
> The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to states under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to Indian tribes to develop waste treatment

---

[50] 40 C.F.R. §35.465(a)(2) (1988).

[51] 33 U.S.C. §1377 (1988).

[52] Section 1251(g) provides that the Act does not supercede, abrogate or impair the authority of states to quantify and allocate water rights. 33 U.S.C. §1215(g) (1988).

management plans and to construct treatment works under this chapter and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.[53]

(c) Reservation of funds

The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to states under section 1285(e) of this title, one-half of one per cent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of water treatment management plans and for the construction of sewage treatment works to serve Indian tribes.

(d) Cooperative agreements

In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the state or states in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

(e) Treatment as states

The Administrator is authorized to treat an Indian tribe as a state for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section, but only if--

---

[53] On January 15, 1988 EPA circulated to Indian tribes a draft "Report to Congress on Indian Wastewater Treatment Needs and Assistance." The draft was prepared by the Office of Municipal Pollution Control in cooperation with the Indian Health Service.

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a state may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 per cent of the cost of a project. Not later than 18 months after February 4, 1987, the Administrator, shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as states for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected states sharing common bodies of water and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by states and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objectives of this chapter.

(f) Grants for nonpoint source programs

The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a state. Not more than one-third of one per cent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

(g) Alaska Native organizations

No provision of this chapter shall be construed to--

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;

(2) create or validate any assertion by such organization of any form of governmental authority over lands or persons in Alaska; or

> (3) in any way affect any assertion that Indian country, as defined in section 1151 of Title 18, exists or does not exist in Alaska.
>
> (h) Definitions
>
> For purposes of this section, the term--
>
> (1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and
>
> (2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.

Pursuant to Section 1377(e), tribes are eligible for treatment as states for purposes of grants for pollution control programs; grants for construction of treatment works; the establishment of water quality standards and implementation plans; the enforcement of standards; participation in the clean lakes program; certification of NPDES permits; issuance of NPDES permits and issuance of permits for dredged or fill material. The provisions of Section 1377(e)(3) required EPA to promulgate final regulations to implement the provisions of Section 1377 by August 4, 1988. Although EPA has established working groups to develop regulations, no regulations have been formally proposed.

C. Superfund

On October 14, 1986 the Superfund Amendments and Reauthorization Act (SARA) was signed into law.[54] SARA contained provisions which require EPA to maximize tribal participation in the Superfund program.[55] SARA further provides that:[56]

---

[54] P.L. 99-499, October 17, 1986; 42 U.S.C. §9601 et. seq. (1988).

[55] 42 U.S.C. §9626(c) (1988).

[56] 42 U.S.C. §9626 (1988).

§9626. Indian Tribes

(a) Treatment Generally.-The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of section 103(a) (regarding notification of releases), section 104(c)(2) (regarding consultation on remedial actions), section 104(e) (regarding access to information), section 104(i) (regarding health authorities) and section 105 (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per State on the National Priorities List.)

(b) Community Relocation.-Should the President determine that proper remedial action is the permanent relocation of tribal members away from a contaminated site because it is cost effective and necessary to protect their health and welfare, such finding must be concurred in by the affected tribal government before relocation shall occur. The President, in cooperation with the Secretary of the Interior, shall also assure that all benefits of the relocation program are provided to the affected tribe and that alternative land of equivalent value is available and satisfactory to the tribe. Any lands acquired for relocation of tribal members shall be held in trust by the United States for the benefit of the tribe.

(c) Study.-The President shall conduct a survey, in consultation with the Indian tribes, to determine the extent of hazardous waste sites on Indian lands. Such survey shall be included within a report which shall make recommendations on the program needs of tribes under this Act, with particular emphasis on how tribal participation in the administration of such program can be maximized. Such report shall be submitted to Congress along with the

> President's budget request for fiscal year 1988.
>
> (d) Limitation.-Notwithstanding any other provision of this Act, no action under this Act by an Indian tribe shall be barred until the later of the following:
>
> > (1) The applicable period of limitation has expired.
> >
> > (2) 2 years after the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this Act.

The Bureau of Indian Affairs, pursuant to Executive Order 12580,[57] has published regulations governing Superfund damage assessments on Indian lands.[58] The President has also delegated to the Secretary of the Interior the duty to provide all cost share assurances for tribes with Superfund sites.[59] EPA has not published regulations to govern tribal participation in the Superfund program.

With respect to the requirement that EPA conduct a survey to identify hazardous waste sites on Indian lands, the President has directed EPA to consult with the Department of the Interior.[60] The Bureau of Indian Affairs is currently involved in fourteen preliminary assessments and three hazardous waste site investigations on six different reservations. One site, the Celtor Chemical Works on the Hoopa Reservation in California is in the process of being cleaned up by EPA.[61]

---

[57] 52 Fed. Reg. 2923 (Jan. 29, 1987).

[58] 43 C.F.R. Part 11.

[59] E.O. 12580 (Jan. 23, 1987); 52 Fed. Reg. 2923 (Jan. 29, 1987).

[60] Id.

During 1985, EPA contracted with the Council of Energy Resource Tribes to identify potential hazardous waste sites on twenty-five Indian reservations. The CERT study revealed that there were 1,196 such sites on or near the reservations included in the survey.[62] In February of 1988, EPA submitted a revised version of the CERT study to the Congress in fulfillment of the requirement of SARA that EPA conduct a survey to determine the extent of hazardous waste sites on Indian lands.[63]

D. The Clean Air Act

While the Nance case was pending in the Ninth Circuit, Congress amended the Clean Air Act to expressly authorize Tribes to redesignate their reservations for purposes of determining applicable air quality standards.[64] In pertinent part, the amendment provided:

> § 7474. Area redesignation
>
> (a) Except as otherwise provided under subsection (c) of this section, a state may redesignate such areas as it deems appropriate as Class I areas. The following areas may be redesignated only as Class I or II.
>
> (1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation, area, a national wild and scenic river, a national wildlife refuge, a national

---

[61] EPA "Hazardous Waste Sites on Indian Lands, Interim Report to Congress Under Section 207(e) of the Superfund Amendments and Reauthorization Act of 1986," February, 1988.

[62] Council of Energy Resource Tribes, "Inventory of Hazardous Waste Generators and Sites on Selected Indian Reservations," July, 1985.

[63] EPA "Hazardous Waste Sites on Indian Lands, Interim Report to Congress Under Section 207(e) of the Superfund Amendments and Reauthorization Act of 1986," February, 1988.

[64] 42 U.S.C. 7474 (1988); P.L. 95-95, August 7, 1977.

lakeshore or seashore; and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

Any area (other than an area referred to in paragraph (1) or (2) or an area established as Class I under the first sentence of section 7472(a) of this title) may be redesignated by the state as Class III if--

(A) such redesignation has been specifically approved by the Governor of the state, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless state law provides that such redesignation must be specifically approved by state legislation) and if general purpose units of local government representing a majority of the residents of the area so designated enact legislation (including for such units of local government resolutions where appropriate) concurring in the state's redesignation;

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be

> subject in all respects to the provisions of subsection (e) of this section.
>
> ....
>
> (e) Resolutions of disputes between states and Indian tribes
>
> If any state affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a state disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any state which the Governor of an affected state or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected state or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any state or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

Tribes are not expressly eligible to participate in the other aspects of EPA's clean air programs. Several tribes have submitted air quality implementation plans to EPA for approval. However, EPA has approved these tribal plans.[65]

E. Federal Insecticide, Fungicide and Rodenticide Act

Pursuant to Section 4(a)(2) of the Federal Insecticide, Funcicide and Rodenticide Act (FIFRA), states may assume responsibility for certification of pesticide applicators.[66] The Act does not provide for tribal assumption of this responsibility. However, on March 12, 1975 EPA promulgated regulations authorizing tribes to assume responsibility for certifying applicators.[67] These regulations provide:

> § 171.10. Certification of Applicators
> on Indian Reservations
>
> This section applies to applicators on Indian reservations.
>
> (a) On Indian reservations not subject to state jurisdiction the appropriate Indian governing body may choose to utilize the state certification program, with the concurrence of the state, or develop its own plan for certifying private and commercial applicators to use or supervise the use of restricted use pesticides.
>
> (1) If the Indian governing body decides to utilize the the state certification program, with the concurrence of the state, or develop its own plan for certifying private and commercial applicators to use or supervise the use of restricted use pesticides.
>
> (2) If the Indian governing body decides to develop its own certification plan, it shall be based on either federal standards (§§ 171.1 through 171.8) or state standards for certification which have been accepted by EPA. Such a plan shall be submitted through the United

---

[65] Teleconference with S. Hoskie, Indian Coordinator, EPA Region 8, March 15, 1988.

[66] 7 U.S.C. §136b(a)(2) (1988).

[67] 40 Fed. Reg. 11704 (March 12, 1975); 40 C.F.R. §171.10 (1988).

> States Department of the Interior to the EPA Administrator for approval.
>
> (b) On Indian reservations where the state has assumed jurisdiction under other federal laws, anyone using or supervising the use of restricted use pesticides shall be certified under the appropriate state certification plan.
>
> (c) Non-Indians applying restricted use pesticides on Indian reservations not subject to state jurisdiction shall be certified either under a state certification plan accepted by the Indian governing body or under the Indian reservation certification plan.
>
> (d) Nothing in this section is intended either to confer or deny jurisdiction to the states over Indian reservations not already conferred or denied under other laws or treaties.

Although the Congress recently amended and reauthorized FIFRA, the provisions of Section 4(a)(2) were unchanged.[68]

F. Resource Conservation and Recovery Act

The Resource and Conservation Recovery Act (RCRA) includes tribes in the definition of municipality.[69] There are no other provisions of RCRA which relate specifically to the authority of EPA to delegate regulatory authority to tribes. However, the Ninth Circuit, in the Washington Department of Ecology case, indicated that EPA could delegate at least portions of its RCRA authority to tribes:

> EPA, having retained regulatory authority over Indian lands in Washington under the interpretation of RCRA that we approve today, can promote the ability of the tribes to govern themselves by allowing them to participate in hazardous waste management. To do so, it need not delegate its full authority to the tribes. We therefore need not decide, and do not decide, the extent to which

---

[68] P.L. 100-532; 102 Stat. 2654 (October 25, 1988).

[69] 42 U.S.C. §6903(13).

> program authority under section 3006 of RCRA is delegable to Indian governments. It is enough that EPA remains free to carry out its policy of encouraging tribal self-government by consulting with the tribes over matters of hazardous waste policy, such as the siting of disposal facilities. ... Other avenues of accommodating tribal sovereignty will doubtless become clear in the concrete administration of the federal program. The 'backdrop' of tribal sovereignty, in light of federal policies encouraging Indian self-government, consequently supports EPA's interpretation of RCRA.[70]

The federal courts also have determined that Tribes are required to comply with the RCRA prohibition on "open dumps."[71]

V. Conclusion

The federal courts, EPA and the Congress are slowly fashioning an appropriate role for tribal governments in the administration and enforcement of federal environmental law on Indian lands. This process can be expected to continue for several more years. In the immediate future EPA will promulgate proposed regulations to implement the Indian amendments to the Clean Water Act. Many tribal governments have made substantial progress toward the day when they will be delegated regulatory primacy by EPA under both the Safe Drinking Water and Clean Water Acts.

The 101st Congress is considered likely to reauthorize both RCRA and the Clean Air Act. Tribal governments are expected to be very active in their efforts to secure Indian amendments to both of these acts consistent with the approach taken by the Congress in the Clean Water Act, the Safe Drinking Water Act and SARA.

---

[70] 752 F.2d at 1472.

[71] Blue Legs v. United States Environmental Protection Agency, 668 F. Supp. 1329 (D.S.D. 1987); 42 U.S.C. §6945(a) (1988).

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

William D. Ruckelshaus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

NOV 8 1984

MEMORANDUM

SUBJECT: Indian Policy Implementation Guidance

FROM: Alvin L. Alm
Deputy Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel

INTRODUCTION

The Administrator has signed the attached EPA Indian Policy. This document sets forth the broad principles that will guide the Agency in its relations with American Indian Tribal Governments and in the administration of EPA programs on Indian reservation lands.

This Policy concerns more than one hundred federally-recognized Tribal Governments and the environment of a geographical area that is larger than the combined area of the States of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine. It is an important sector of the country, and constitutes the remaining lands of America's first stewards of the environment, the American Indian Tribes.

The Policy places a strong emphasis on incorporating Tribal Governments into the operation and management of EPA's delegable programs. This concept is based on the President's Federal Indian Policy published on January 24, 1983 and the analysis, recommendations and Agency input to the EPA Indian Work Group's Discussion Paper, Administration of Environmental Programs on American Indian Reservations (July 1983).

TIMING AND SCOPE

Because of the importance of the reservation environments, we must begin immediately to incorporate the principles of EPA's Indian Policy into the conduct of our everyday business. Our established operating procedures (including long-range budgetary and operational planning activities) have not consistently focused on the proper role of Tribal Governments or the special legal and political problems of program management on Indian lands. As a result, it will require a phased and sustained effort over time to fully implement the principles of the Policy and to take the steps outlined in this Guidance.

Some Regions and Program Offices have already made individual starts along the lines of the Policy and Guidance. I believe that a clear Agency-wide policy will enable all programs to build on these efforts so that, within the limits of our legal and budgetary constraints, the Agency as a whole can make respectable progress in the next year.

As we begin the first year of operations under the Indian Policy, we cannot expect to solve all of the problems we will face in administering programs under the unique legal and political circumstances presented by Indian reservations. We can, however, concentrate on specific priority problems and issues and proceed to address these systematically and carefully in the first year. With this general emphasis, I believe that we can make respectable progress and establish good precedents for working effectively with Tribes. By working within a manageable scope and pace, we can develop a coordinated base which can be expanded, and, as appropriate, accelerated in the second and third years of operations under the Policy.

In addition to routine application of the Policy and this Guidance in the conduct of our everyday business, the first year's implementation effort will emphasize concentrated work on a discrete number of representative problems through cooperative programs or pilot projects. In the Regions, this effort should include the identification and initiation of work on priority Tribal projects. At Headquarters, it should involve the resolution of the legal, policy and procedural problems which hamper our ability to implement the kinds of projects identified by the Regions.

The Indian Work Group (IWG), which is chaired by the Director of the Office of Federal Activities and composed of representatives of key regional and headquarters offices, will facilitate and coordinate these efforts. The IWG will begin immediately to help identify the specific projects which may be ripe for implementation and the problems needing resolution in the first year.

Because we are starting in "mid-stream," the implementation effort will necessarily require some contribution of personnel time and funds. While no one program will be affected in a major fashion, almost all Agency programs are affected to some degree. I do not expect the investment in projects on Indian Lands to cause any serious restriction in the States' funding support or in their ability to function effectively. To preserve the flexibility of each Region and each program, we have not set a target for allocation of FY 85 funds. I am confident, however, that Regions and program offices can, through readjustment of existing resources, demonstrate significant and credible progress in the implementation of EPA's Policy in the next year.

ACTION

Subject to these constraints, Regions and program managers should now initiate actions to implement the principles of the Indian Policy. The eight categories set forth below will direct our initial implementation activities. Further guidance will be provided by the Assistant Administrator for External Affairs as experience indicates a need for such guidance.

1. THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS WILL SERVE AS LEAD AGENCY CLEARINGHOUSE AND COORDINATOR FOR INDIAN POLICY MATTERS.

This responsibility will include coordinating the development of appropriate Agency guidelines pertaining to Indian issues, the implementation of the Indian Policy and this Guidance. In this effort the Assistant Administrator for External Affairs will rely upon the assistance and support of the EPA Indian Work Group.

2. THE INDIAN WORK GROUP (IWG) WILL ASSIST AND SUPPORT THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS IN DEVELOPING AND RECOMMENDING DETAILED GUIDANCE AS NEEDED ON INDIAN POLICY AND IMPLEMENTATION MATTERS. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD DESIGNATE APPROPRIATE REPRESENTATIVES TO THE INDIAN WORK GROUP AND PROVIDE THEM WITH ADEQUATE TIME AND RESOURCES NEEDED TO CARRY OUT THE IWG'S RESPONSIBILITIES UNDER THE DIRECTION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS.

The Indian Work Group, (IWG) chaired by the Director of the Office of Federal Activities, will be an important entity for consolidating the experience and advice of the key Assistant and Regional Administrators on Indian Policy matters. It will perform the following functions: identify specific legal, policy, and procedural impediments to working directly with Tribes on reservation problems; help develop appropriate guidance for overcoming such impediments; recommend opportunities for implementation of appropriate programs or pilot projects; and perform other services in support of Agency managers in implementing the Indian Policy.

The initial task of the IWG will be to develop recommendations and suggest priorities for specific opportunities for program implementation in the first year of operations under the Indian Policy and this Guidance.

To accomplish this, the General Counsel and each Regional and Assistant Administrator must be actively represented on the IWG by a staff member authorized to speak for his or her office. Further, the designated representative(s) should be afforded the time and resources, including travel, needed to provide significant staff support to the work of the IWG.

3. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD UNDERTAKE ACTIVE OUTREACH AND LIAISON WITH TRIBES, PROVIDING ADEQUATE INFORMATION TO ALLOW THEM TO WORK WITH US IN AN INFORMED WAY.

In the first thirteen years of the Agency's existence, we have worked hard to establish working relationships with State Governments, providing background information and sufficient interpretation and explanations to enable them to work effectively with us in the development of cooperative State programs under our various statutes. In a similar manner, EPA managers should try to establish direct, face-to-face contact (preferably on the reservation) with Tribal Government officials. This liaison is essential to understanding Tribal needs, perspectives and priorities. It will also foster Tribal understanding of EPA's programs and procedures needed to deal effectively with us.

4. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD ALLOCATE RESOURCES TO MEET TRIBAL NEEDS, WITHIN THE CONSTRAINTS IMPOSED BY COMPETING PRIORITIES AND BY OUR LEGAL AUTHORITY.

As Tribes move to assume responsibilities similar to those borne by EPA or State Governments, an appropriate block of funds must be set aside to support reservation abatement, control and compliance activities.

Because we want to begin to implement the Indian Policy now, we cannot wait until FY 87 to formally budget for programs on Indian lands. Accordingly, for many programs, funds for initial Indian projects in FY 85 and FY 86 will need to come from resources currently planned for support to EPA-and State-managed programs meeting similar objectives. As I stated earlier, we do not expect to resolve all problems and address all environmental needs on reservations immediately. However, we can make a significant beginning without unduly restricting our ability to fund ongoing programs.

I am asking each Assistant Administrator and Regional Administrator to take measures within his or her discretion and authority to provide sufficient staff time and grant funds to allow the Agency to initiate projects on Indian lands in FY 85 and FY 86 that will constitute a respectable step towards implementation of the Indian Policy.

5. ASSISTANT AND REGIONAL ADMINISTRATORS, WITH LEGAL SUPPORT PROVIDED BY THE GENERAL COUNSEL, SHOULD ASSIST TRIBAL GOVERNMENTS IN PROGRAM DEVELOPMENT AS THEY HAVE DONE FOR THE STATES.

The Agency has provided extensive staff work and assistance to State Governments over the years in the development of environmental programs and program management capabilities. This assistance has become a routine aspect of Federal/State relations, enabling and expediting the States' assumption of delegable programs under the various EPA statutes. This "front end" investment has promoted cooperation and increased State involvement in the regulatory process.

As the Agency begins to deal with Tribal Governments as partners in reservation environmental programming, we will find a similar need for EPA assistance. Many Regional and program personnel have extensive experience in working with States on program design and development; their expertise should be used to assist Tribal Governments where needed.

6. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD TAKE ACTIVE STEPS TO ALLOW TRIBES TO PROVIDE INFORMED INPUT INTO EPA'S DECISION-MAKING AND PROGRAM MANAGEMENT ACTIVITIES WHICH AFFECT RESERVATION ENVIRONMENTS.

Where EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments. Agency managers should make a special effort to inform Tribes of EPA decisions and activities which can affect their reservations and solicit their input as we have done with State Governments. Where necessary, this should include providing the necessary information, explanation and/or briefings needed to foster the informed participation of Tribal Governments in the Agency's standard-setting and policy-making activities.

7. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD, TO THE MAXIMUM FEASIBLE EXTENT, INCORPORATE TRIBAL CONCERNS, NEEDS AND PREFERENCES INTO EPA'S POLICY DECISIONS AND PROGRAM MANAGEMENT ACTIVITIES AFFECTING RESERVATIONS.

It has been EPA's practice to seek out and accord special consideration to local interests and concerns, within the limits allowed by our statutory mandate and nationally established criteria and standards. Consistent with the Federal and Agency policy to recognize Tribal Governments as the primary voice for expressing public policy on reservations, EPA managers should, within the limits of their flexibility, seek and utilize Tribal input and preferences in those situations where we have traditionally utilized State or local input.

We recognize that conflicts in policy, priority or preference may arise between States and Tribes as it does between neighboring States. As in the case of conflicts between neighboring States, EPA will encourage early communication and cooperation between Tribal and State Governments to avoid and resolve such issues. This is not intended to lend Federal support to any one party in its dealings with the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the interests of both.

Several of the environmental statutes include a conflict resolution mechanism which enables EPA to use its good offices to balance and resolve the conflict. These procedures can be applied to conflicts between Tribal and State Governments that cannot otherwise be resolved. EPA can play a moderating role by following the conflict resolution principles set by the statute, the Federal trust responsibility and the EPA Indian Policy.

8. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD WORK COOPERATIVELY WITH TRIBAL GOVERNMENTS TO ACHIEVE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS, CONSISTENT WITH THE PRINCIPLE OF INDIAN SELF-GOVERNMENT.

The EPA Indian Policy recognizes Tribal Governments as the key governments having responsibility for matters affecting the health and welfare of the Tribe. Accordingly, where tribally owned or managed facilities do not meet Federally established standards, the Agency will endeavor to work with the Tribal leadership to enable the Tribe to achieve compliance. Where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as we do to noncompliance by the private sector off-reservation.

Actions to enable and ensure compliance by Tribal facilities with Federal statutes and regulations include providing consultation and technical support to Tribal leaders and managers concerning the impacts of noncompliance on Tribal health and the reservation environment and steps needed to achieve such compliance. As appropriate, EPA may also develop compliance agreements with Tribal Governments and work cooperatively with other Federal agencies to assist Tribes in meeting Federal standards.

Because of the unique legal and political status of Indian Tribes in the Federal System, direct EPA actions against Tribal facilities through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Regional Administrators proposing to initiate such action should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel. In emergency situations, the Regional Administrator may issue emergency Temporary Restraining Orders, provided that the appropriate procedures set forth in Agency delegations for such actions are followed.

9. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD BEGIN TO FACTOR INDIAN POLICY GOALS INTO THEIR LONG-RANGE PLANNING AND PROGRAM MANAGEMENT ACTIVITIES, INCLUDING BUDGET, OPERATING GUIDANCE, MANAGEMENT ACCOUNTABILITY SYSTEMS AND PERFORMANCE STANDARDS.

In order to carry out the principles of the EPA Indian Policy and work effectively with Tribal Governments on a long-range basis, it will be necessary to institutionalize the Agency's policy goals in the management systems that regulate Agency behavior. Where we have systematically incorporated State needs, concerns and cooperative roles into our budget, Operating Guidance, management accountability systems and performance standards, we must now begin to factor the Agency's Indian Policy goals into these same procedures and activities.

Agency managers should begin to consider Indian reservations and Tribes when conducting routine planning and management activities or carrying out special policy analysis activities. In addition, the IWG, operating under the direction of the Assistant Administrator for External Affairs and with assistance from the Assistant Administrator for Policy, Planning and Evaluation, will identify and recommend specific steps to be taken to ensure that Indian Policy goals are effectively incorporated and institutionalized in the Agency's procedures and operations.

Attachment

GOVER, STETSON & WILLIAMS, P. C.
ATTORNEYS AT LAW
1225 RIO GRANDE BOULEVARD, N. W.
ALBUQUERQUE, NEW MEXICO 87104-2630
PHONE (505) 842-6961
TELEFAX (505) 842-6028

B. KEVIN GOVER *
CATHERINE BAKER STETSON
SUSAN M. WILLIAMS **
ERIC D. EBERHARD *

* ADMITTED IN NEW MEXICO AND DISTRICT OF COLUMBIA
** ADMITTED ONLY IN THE DISTRICT OF COLUMBIA

WASHINGTON OFFICE
1155 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036
PHONE (202) 457-[illegible]
TELEFAX (202) 457-5584

January 11, 1989

Mr. David P. Phillips
Executive Director
Rocky Mountain Mineral Law Foundation
Porter Administration Building
7039 East 18th Avenue
Denver, Colorado 80220

Dear Mr. Phillips:

Please find enclosed an original of Paper 15 for the Institute on Mineral Development on Indian Lands. I am also enclosing a brief biographical sketch.

Please do not hesitate to let me know if you need anything further from me prior to the conference.

Sincerely,

Eric D. Eberhard

Encl.

GOVER, STETSON & WILLIAMS, P. C.
ATTORNEYS AT LAW
1225 RIO GRANDE BOULEVARD, N. W.
ALBUQUERQUE, NEW MEXICO 87104-2630
PHONE (505) 842-6961
TELEFAX (505) 842-6028

B. KEVIN GOVER *
CATHERINE BAKER STETSON
SUSAN M. WILLIAMS **
ERIC D. EBERHARD *

* ADMITTED IN NEW MEXICO AND DISTRICT OF COLUMBIA
** ADMITTED ONLY IN THE DISTRICT OF COLUMBIA

WASHINGTON OFFICE
1155 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036
PHONE (202) 457-6682
TELEFAX (202) 457-6684

January 11, 1989

Mr. B. Kevin Gover
Gover, Stetson, Williams & West, P.C.
1225 Rio Grande Blvd. N.W.
Suite C
Albuquerque, New Mexico 49783

Dear Kevin:

Please find enclosed an original of the final draft of my paper for the Institute on Mineral Development on Indian Lands. While I am not really pleased with the lack of analysis, the paper does at least pull all of the statutes into one place and is hopefully useful for that reason.

I have forwarded another original to David Phillips at the Mineral Law Foundation. Please be sure to let me know if there is anything else I need to do prior to the conference.

Sincerely,

Eric

Eric D. Eberhard

c.c. Leigh Price

Encl.

TRIBAL CIVIL REGULATORY JURISDICTION TO ENFORCE ENVIRONMENTAL LAWS

Jana L. Walker
and
B. Kevin Gover

Gover, Stetson, Williams & West, P.C.
Albuquerque, New Mexico

The development of reservation economies has largely been controlled by federal policy historically geared to bring tribal resources to the nation's marketplace. While large quantities of tribal natural resources have been lost since the European arrival, tribal governments are presently in an era of reversing tribal resources loss and are moving towards preserving the integrity of a tribal land base. An essential means by which Indian tribes will maintain the integrity of tribal lands is through environmental regulation. As tribes have begun developing natural resources and promoting economic development on tribal lands, questions of jurisdictional authority over environmental protection programs within Indian country[1] have arisen.

Federal environmental regulatory laws generally require the Environmental Protection Agency ("EPA"), to establish standards for various sources of pollution, enforce standards through a permitting system, and where a state so requests, delegate primary enforcement authority to the state. In general, no person or activity is beyond the reach of federal environmental statutes or outside the jurisdiction of the state in which the person conducts his activity. However, special rules apply when the regulated person is an Indian or Indian tribe or the regulated activity takes place within Indian country. This paper will discuss questions concerning the applicability of federal environmental laws to Indians and Indian country, the scope of tribal and state authority to enforce environmental laws within Indian country, and the current status of environmental laws and policy.

---

[1] "Indian country encompasses more territory than the term "reservation," which generally refers to land reserved by treaty, statute, or executive order. See generally, F.S. Cohen, Handbook of Federal Indian Law, ch.1 (1982 ed.). "Indian country" is statutorily defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. Section 1151 (1982).

I. APPLICABILITY OF FEDERAL ENVIRONMENTAL LAWS TO INDIANS AND INDIAN LANDS

Indian tribes have been characterized as "domestic dependent nations"[2] which possess all powers of government that have not been explicitly removed by the United States or held inconsistent with a tribe's status as a domestic dependent nation.[3] Based on this unique political status, Congress has full plenary power to legislate with respect to Indians and Indian tribes.[4] Thus, the initial inquiry is whether federal environmental regulatory statutes apply to Indians, Indian tribes, and Indian lands.

Congressional power to include Indians and tribes within the scope of federal statutes is unquestionable.[5] However, whether a specific federal statute of general applicability applies to Indians and tribes depends on the intent of Congress.[6] General federal laws apply within Indian country and are enforceable against Indians and Indian tribes where the statute expressly mentions Indians and tribes.[7] In most instances interpretative questions arise when federal laws do not specifically refer to Indians and tribes, but instead appear to apply across the board to all persons or property.[8] In resolving these questions against the backdrop of tribal sovereignty, the United States Supreme Court generally requires that

---

[2] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[3] See generally, F.S. Cohen, Handbook of Federal Indian Law, 231 (1982 ed.); see also, United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[4] Lone Wolf v. Hitchcock, 187 U.S. 533 (1903). This power is not absolute, but is subject to guardianship and constitutional limits. United States v. Sioux Nation, 448 U.S. 371, 415 (1980).

[5] See supra note 4.

[6] F.S. Cohen, Handbook of Federal Indian Law, 282 (1982 ed.).

[7] "The intended coverage of statutes specifically pertaining to Indians is generally clear; by their terms these laws are either territorially confined to Indian country or are topically applicable only to Indians, tribes, the Indian Service, or Indian property." F.S. Cohen, Handbook of Federal Indian Law, 282 (1982 ed.).

[8] Examples of such general federal laws include federal tax laws, environmental laws, civil rights laws, laws regulating business activities and labor relations regulations. F.S. Cohen, Handbook of Federal Indian Law, 282 (1982 ed.).

Congress' intent to invade tribal rights and authority be clearly expressed in the legislative history, or the surrounding circumstances, or by the existence of a statutory scheme requiring national or uniform application.[9] Special considerations are triggered when the subject of the enactment involves treaty rights and areas traditionally left to tribal self-government.[10] The following authorities establish and apply the analysis used by courts to resolve issues regarding the applicability of general federal laws to Indians.

A. The General Rule.

Where a general federal law fails to expressly include or exclude Indians, Indian tribes, or Indian property, courts will hold the law applicable if the nature of the legislation, or the congressional purpose underlying the enactment, requires national or uniform application.

In Federal Power Commission v. Tuscarora Indian Nation,[11] the State of New York applied to the Federal Power Commission (the "FPC") for a license to construct a power project that would require flooding of lands owned in fee simple by the Tuscarora Indian Nation (the "Tuscaroras"). The Tuscaroras intervened in the administrative proceedings claiming that the State lacked authority to acquire tribal lands for the project. The FPC issued an order granting the license.[12] On appeal by the Tuscaroras to the United States Court of Appeals for the District of Columbia, the proceedings were remanded to the FPC.[13] Following a second order from the FPC, the Court of Appeals instructed the FPC to amend the license to exclude the power of the State to condemn lands belonging to the Tuscaroras.

On certiorari, the United States Supreme Court held that lands owned in fee simple by the Tuscaroras were subject to condemnation by a licensee under authority granted by the Federal Power Act. The Court first ruled that because the Tuscaroras owned their reservation in fee simple, the lands at issue were not "reservation" lands within the meaning of the Federal Power Act. Thus, the FPC was not constrained by 16 U.S.C. Section 797(e), which required that before a license could be issued the FPC must find that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired...."[14]

---

[9] See, e.g., F.S.Cohen, Handbook of Federal Indian Law, 283 (1982 ed.); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Bryan v. Itasca County, 426 U.S. 373 (1976).

[10] See, e.g., United States v. Dion, 476 U.S. 734 (1986).

[11] Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

[12] On application to the FPC for rehearing, the Tuscaroras claimed that the tribal lands at issue were part of a "reservation" as defined in the Federal Power Act, 49 Stat. 838, 16 U.S.C. Sections 796(2) and 797(e), and as such, could not be taken for reservoir purposes unless the FPC found "that the license will not interefere or be inconsistent with the purpose for which such reservation was created or acquired." Id. at 107.

[13] The Court of Appeals held that the tribal lands constituted a part of reservation within the meaning of the Federal Power Act and remanded the case to the FPC to "explore the possibility of making that finding." Id. at 109.

The Court next considered the issue of whether the condemnation authority contained in the Federal Power Act applied to Indian lands. The Tuscaroras argued that, as a general act of Congress, the provisions and eminent domain powers of the Federal Power Act did not apply to Indians or tribal lands. In rejecting this argument, the Court stated:

> The Tuscarora Indian Nation relies heavily upon Elk v. Wilkins. It is true that in that case the Court...said: "Under the constitution of the United States, as originally established...General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." However that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.[15] (Citations omitted; emphasis added.)

The Court relied heavily on a series of cases which held that Indians generally are subject to federal tax laws.[16] Based on its prior analysis in these tax cases, the Court then stated:

> The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission, and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been

---

[14] Id. at 111.

[15] Id. at 115-116.

[16] For example, the Court cited Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935) and Choteau v. Burnet, 283 U.S. 691 (1931), for the proposition that the federal Internal Revenue Act is very broad, the legislative intent of that Act was to tax all residents of the United States as to any source of income, and nothing in that Act indicated that Indians were excepted. Id. at 116-117.

> shown, the Act specifically defines and treats with lands occupied by Indians - "tribal lands embraced within Indian reservations." The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. The Court of Appeals recognized that this is so. Section 21 of the Act, by broad general terms, authorizes the licensee to condemn "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project. That section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.[17] (Citations omitted.)

B. Exceptions To the General Rule.

Although treaty rights may be unilaterally abrogated by Congress,[18] three rules of construction have been applied by courts to determine whether Congress intended to abrogate Indian treaties: (1) repeals by implication are not favored;[19] (2) specific laws prevail over general laws;[20] and (3) ambiguities or doubts must be construed in favor of the Indians.[21] If the application of a federal statute to Indians or tribes will result in an abrogation of rights reserved by treaty, courts will require a clear indication that Congress was aware of the statute's impact on treaty rights before the statute will be held to apply.[22]

In Donovan v. Navajo Forest Products Industries,[23] the Department of Labor inspected the facilities of Navajo Forest Products Industries ("NFPI"), and issued a citation to NFPI under the Occupational Safety and

---

[17] Id. at 118.

[18] Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (Treaties do not limit Congress' plenary power over Indian tribes).

[19] Morton v. Mancari, 417 U.S. 535, 549-50 (1974).

[20] Id. at 550-551.

[21] Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); See generally, F.S. Cohen, Handbook of Federal Indian Law, 283 (1982 ed.).

[22] United States v. Dion, 476 U.S. 734 (1986).

[23] Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).

Health Act of 1970 ("OSHA").[24] Although NFPI conceded that it fell within OSHA's definition of "employer," NFPI contended that under the terms of a treaty the Secretary lacked jurisdiction over Indian tribal enterprises on tribal land.[25] The Occupational Safety and Health Review Commission (the "Commission") adopted the conclusion of an Administrative Law Judge (the "ALJ"), that the Secretary of Labor lacked jurisdiction. The Secretary petitioned for review to the Tenth Circuit Court of Appeals.

The Tenth Circuit Court of Appeals agreed with the conclusions of both the ALJ and the Commission and held that:

> OSHA did not apply to NFPI because there exists no legislative intent in OSHA or its legislative history to abrogate the treaty entered into between the United States government and the Navajo Tribe; thus to apply OSHA to NFPI would violate the Navajo Treaty.[26]

As support for the position that OSHA applied to NFPI, the Secretary relied heavily on the Tuscarora language concerning the application of general federal statutes to Indians.[27] The court distinguished Tuscarora stating that:

> Tuscarora did not, however, involve an Indian treaty. Therein lies the distinguishing feature between the case at bar and the Tuscarora line of cases, which stand for the rule that under statutes of general application Indians are treated as any other person, unless Congress expressly excepts them therefrom. The Tuscarora rule does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights.[28] (Citations omitted; emphasis added.)

---

[24] 29 U.S.C. Sections 651 et seq. (1982).

[25] Article II of the Navajo Treaty of June 1, 1868, 15 Stat. 667, provides that "no person...except such officers...of the government...as may be authorized to enter upon Indian reservations in discharge of duties imposed by law" may enter the Reservation.

[26] Navajo Forest Products Industries, 692 F.2d at 710.

[27] The specific language relied on states "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." Id. at 711 (citing, Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)).

[28] Id.

In Donovan v. Coeur d'Alene Tribal Farm,[29] a compliance officer from the Occupational Safety and Health Administration inspected the Coeur d'Alene tribal farm (the "Farm"), issued citations and proposed a fine.[30] The Farm challenged the citations relying on the favorable precedent established in Navajo Forest Products Industries.[31] An Administrative Law Judge ("ALJ") affirmed the citations and proposed fines. The Farm petitioned the Occupational Safety and Health Review Commission (the "Review Commission") for review on whether the Occupational Safety and Health Act ("OSHA")[32] applied to tribal enterprises. Ultimately, the Review Commission vacated the citations and the Secretary of Labor appealed to the Ninth Circuit Court of Appeals.[33]

The Ninth Circuit held that OSHA applied to commercial activities carried on at the Farm because application of OSHA does not abridge treaty rights or other exclusive rights of Indian self-government. The court distinguished Navajo Forest Products Industries[34] by stating that "there is no treaty between the Coeur d'Alene Tribe and the United States" or any other "document to which the United States is a signatory that specifically guarantees the Tribe's right to exclude non-Indians."[35] On this basis, the court ruled that the Tribe was not able to assert successfully the treaty right exception to the rule that federal statutes of general application apply to Indians and Indian tribes.

---

[29] Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

[30] The Coeur d'Alene Indian Tribe is organized under federal law and occupies a 350,000 acre reservation in northern Idaho. No formal treaties exist between the tribe and the United States government. The Farm is a tribally owned and operated commercial enterprise which produced grain and lentils for intrastate and interstate sale. Id. at 1114.

[31] Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).

[32] 29 U.S.C. Section 651-678 (1982).

[33] The Review Commission remanded the case to the ALJ to review the ALJ's previous ruling in light of the decision in Navajo Forest Products Industries. The ALJ reaffirmed his decision. The Farm petitioned and was again granted review on whether OSHA applied to tribal enterprises. Coeur d'Alene Tribal Farm, 751 F.2d at 1115.

[34] Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).

[35] Coeur d'Alene Tribal Farm, 751 F.2d at 1117.

The Tribe also relied on United States v. Farris,[36] arguing that because the application of OSHA would affect "exclusive rights of self-government in purely intramural matters," the statute must expressly indicate that it is to be applied to Indian tribes. The court responded that:

> The Farm's argument proves far too much. To accept it would bring within the embrace of "tribal self-government" all tribal business and commercial activity....[I]f the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government, so too, it would seem, is the right to run a tribal enterprise free of the potentially ruinous burden of federal taxes. Yet our cases make clear that federal taxes apply to rservation activities even without a "clear" expression of congressional intent....We believe that the tribal self-government exception is designated to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes.[37] (Citations omitted.)

C. Applicability of Specific Federal Environmental Statutes.

Federal environmental regulatory laws require uniform application to be effective. Both the Clean Air Act[38] and the Resource Conservation and Recovery Act ("RCRA")[39] have been held to apply to Indian lands. While the RCRA literally includes tribes within the class of persons against whom the statute may be enforced, the Clean Air Act does not. No case in which a tribe has successfully challenged the application of federal environmental laws to its lands has been reported.

---

[36] United States v. Farris, 624 F.2d 890 (9th Cir. 1980).

[37] Coeur d'Alene Tribal Farm, 751 F.2d at 1116.

[38] Clean Air Act, 42 U.S.C. Sections 7401-7642 (1982).

[39] Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901-6991i (1982).

1. Resource Conservation and Recovery Act[40]

Two federal courts have held that the RCRA applies to Indian lands and may be enforced against Indian tribes.[41] In Blue Legs v. United States Environmental Protection Agency,[42] the Oglala Sioux Tribe operated several solid waste disposal sites on lands owned by the Tribe within the Pine Ridge Reservation. Each of the sites was operated as an "open dump," despite the prohibition on such dumps in the RCRA.[43] The plaintiffs brought suit under the RCRA's citizens suit provision[44] against the Tribe, the Bureau of Indian Affairs, the Indian Health Service and the Environmental Protection Agency for violations of the RCRA. The Court ruled that federal jurisdiction existed to enforce provisions of the RCRA concerning the prohibition of open dumps against the Tribe. Additionally, the court held that the Tribe has the responsibility, stemming from its inherent sovereignty, to regulate, operate and maintain the dumps on the Reservation.[45] The court noted that the citizen suit provision could be invoked for proceedings against "persons engaged in the act of open dumping." The term person is defined by the RCRA as including a municipality,[46] which in turn is defined to include "an Indian tribe."[47] The court concluded that these provisions and definitions indicate that Congress intended to include Indian tribes as regulated entities under the RCRA.[48]

---

[40] Id.

[41] Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985); Blue Legs v. United States Environmental Protection Agency, 668 F.Supp. 1329 (D.S.D. 1987).

[42] Blue Legs v. United States Environmental Protection Agency, 668 F.Supp. 1329 (D.S.D. 1987).

[43] See 42 U.S.C. Section 6945.

[44] The citizens suit provision of the RCRA is found at 42 U.S.C. Section 6972. This provision, combined with the open dumping prohibition of the RCRA, creates a federal cause of action which allows citizens and states to seek judicial relief from federal courts for damaging solid waste practices. Blue Legs, 668 F.Supp. at 1336.

[45] Id. at 1337.

[46] 42 U.S.C. Section 6903(15).

[47] 42 U.S.C. Section 6903(13).

[48] Blue Legs, 668 F.Supp. at 1337. The court also relied heavily on the decision in State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985), which established that Indian tribes are regulated entities under the RCRA. The court reasoned that as such, tribes should also be subject to the citizen

2. Clean Air Act[49]

The enforcement provisions of the Clean Air Act apply to "owners," "operators," and "persons."[50] However, none of these terms specifically include Indian tribes.[51] As a result, at least some doubt exists that tribes are subject to the Act. The Clean Air Act is a law as to which "the congressional purpose of the statutory scheme clearly requires a national or uniform application."[52] Thus, the Act likely would be held to apply to Indian tribes.

3. Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")[53]

The prohibitions of the FIFRA generally apply to any "person."[54] The definition of "person," however, does not specifically include Indian tribes.[55] As is true of the Clean Air Act, at least some doubt exists as to the FIFRA's applicability to Indian tribes.

4. Clean Water Act ("CWA")[56]

The enforcement provisions of the CWA apply to "persons."[57] "Person" is defined to include "municipalities."[58] "Municipality" is defined to

---

suit provision of the RCRA. Id. at 1338.

[49] Clean Air Act, 42 U.S.C. Sections 7401-7642 (1982).

[50] See, e.g., 42 U.S.C. Section 7411(e) and Section 7412(c).

[51] See 42 U.S.C. Sections 7411(a), 7412(a) and 7602(e).

[52] See F.S. Cohen, Handbook of Federal Indian Law, 283 (1982 ed.) and authorities cited therein.

[53] Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sections 136-136y (1982).

[54] See, e.g., 7 U.S.C. Sections 136a(a) and 136e(a).

[55] See 7 U.S.C. Section 136(s).

[56] Clean Water Act, 33 U.S.C. Sections 1251-1376 (1982) (previously known as the Federal Water Pollution Control Act).

[57] See, e.g., 33 U.S.C. Section 1311(a).

[58] 33 U.S.C. Section 1362(5).

include an Indian tribe.[59] The reasoning of the Blue Legs[60] and Washington Department of Ecology[61] cases yields the conclusion that the Act applies to Indian tribes.

5. Safe Drinking Water Act ("SDWA")[62]

National primary drinking water regulations apply to all "public water systems."[63] A "supplier of water" is "any person who owns or operates a public water system."[64] "Person" is defined to include a "municipality,"[65] and "municipality" is defined to include an "Indian tribe."[66] Again, Blue Legs[67] and Washington Department of Ecology[68] would indicate that tribes are subject to the Act.

II. TRIBAL AUTHORITY TO ENFORCE ENVIRONMENTAL LAWS

The likely result of litigation concerning the applicability of federal environmental laws to Indians, Indian tribes and Indian lands is that the laws will be held to apply. Moreover, virtually no question exists that Congress can expressly require the application of such laws to Indians and Indian lands.[69]

Given that federal environmental laws either do apply to Indian lands, or can be made to apply, the issue becomes one of determining which government---federal, tribal or state---should enforce those laws within Indian country. Before that issue may be resolved and policy established, the scope of tribal jurisdiction must be determined. No doubt exists as to the power of tribes to enforce tribal laws against members. The key inquiry is whether tribes may enforce their laws against non-members. This Section discusses the emerging case law on the application of tribal civil regulatory laws to non-Indians.

---

[59] 33 U.S.C. Section 1362(4).

[60] Blue Legs v. United States Environmental Protection Agency, 668 F.Supp. 1329 (D.S.D 1987).

[61] State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

[62] Safe Drinking Water Act, 42 U.S.C. Sections 300f-300j (1982).

[63] See 42 U.S.C. Section 300g.

[64] 42 U.S.C. Section 300f(5).

[65] 42 U.S.C. Section 300f(12).

[66] 42 U.S.C. Section 300f(10).

[67] Blue Legs v. United States Environmental Protection Agency, 668 F.Supp. at 1329 (D.S.D. 1987).

[68] State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

[69] See supra note 4.

A. General Tribal Sovereign Authority Over Non-Indians.

Tribes retain sovereign authority to regulate activities within their territory. This power extends to non-Indian activities on fee lands within reservations when those activities affect or threaten important tribal interests.

In United States v. Mazurie,[70] the United States Supreme Court addressed the question of whether Congress may properly delegate its regulatory authority to tribes. The Mazuries were non-Indians operating a bar on non-Indian land within the Wind River Indian Reservation. The bar was located on the outskirts of Fort Washakie, an unincorporated community where both the BIA Agency and tribal government offices were located. Enacted in 1953, 18 U.S.C. Section 1161 authorizes tribes to regulate the introduction of liquor into Indian country so long as state law is not violated. The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation enacted an ordinance pursuant to this authority requiring retail liquor outlets within Indian country to obtain both tribal and state licenses. The Mazuries applied for a tribal license, but the application was denied. Following operation of the bar without a tribal license, federal officials seized their stock of alcohol and initiated criminal proceedings. The Tenth Circuit Court of Appeals reversed the District Court conviction of the Mazuries holding that 18 U.S.C. Section 1161 unlawfully delegated federal power to tribal governments. On petition for certiorari, the United States Supreme Court held that Congress has the power to control sales of alcoholic beverages on fee land within the boundaries of an Indian reservation and may delegate that power to a tribal governing body.

The Court relied on the Indian Commerce Clause[71] and the "recognized relation of tribal Indians to the federal government" in upholding Congress' power to regulate liquor in Indian country.[72] While the Tenth Circuit had characterized the tribal government as a "private, voluntary organization, which is obviously not a governmental agency" in striking down the delegation of federal authority, the United States Supreme Court responded as follows:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. Those

---

[70] United States v. Mazurie, 419 U.S. 544 (1975).

[71] U.S. Const. art.I, Section 8.

[72] Mazurie, 419 U.S. at 553-57.

> limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are "a separate people" possessing "the power of regulating their internal and social relations."
>
> [Previous decisions of the Court] surely establish that Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations," and they thus undermine the rationale of the Court of Appeals' decision. These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce...with the Indian tribes."[73] (Citations omitted.)

The seminal case of Montana v. United States,[74] sets forth principles which guide courts in determining the extent of tribal civil regulatory authority over non-Indians within reservation boundaries. In 1974, the Crow Tribe enacted an ordinance prohibiting hunting and fishing within the Crow Reservation by non-members of the Tribe. The Tribe's interest in enacting the ordinance involved primarily sports fishing and duck hunting on the Big Horn River. The United States filed suit on behalf of the Tribe to quiet title to the bed of the Big Horn in the United States as trustee for the Tribe and for a declaratory judgment establishing that the Tribe and the United States have exclusive jurisdiction to regulate hunting and fishing on the Reservation. The District Court denied the requested relief. The Ninth Circuit Court of Appeals reversed, holding that the United States retained title to the bed of the Big Horn in trust for the benefit of the Tribe. The Court of Appeals also ruled that the Tribe could regulate hunting and fishing by non-Indians within the Reservation, but the Tribe could not prohibit hunting and fishing on fee lands by non-member owners of those lands. The State of Montana requested certiorari.

---

[73] Id. at 556-57.

[74] Montana v. United States, 450 U.S. 544 (1981).

The United States Supreme Court held that title to the bed of the Big Horn River passed to the State of Montana upon the granting of statehood. Additionally, the Court held that neither the Crow treaties nor inherent tribal sovereignty empowered the Crows to regulate non-Indian hunting and fishing on fee-patented land within the Reservation. The Court found that because the United States generally holds lands under navigable water in trust for future states, a strong presumption against conveyance to others exists. The Crow treaties did not overcome this presumption.[75] Although the 1868 Treaty with the Crows arguably conferred upon the Tribe authority to control hunting and fishing on lands set aside for the Tribe, the Court ruled that this authority extended only to lands on which the Tribe exercises "undisturbed use and occupation" and could not apply to lands subsequently alienated and held in fee by non-Indians pursuant to the allotment acts.[76]

In rejecting the Crows' argument for tribal jurisdiction over non-Indian hunting and fishing on fee lands, the Court distinguished between tribal authority over Indians and tribal authority over non-Indians. Relying on United States v. Wheeler,[77] the Court held that:

> [E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt [the ordinance prohibiting non-Indian hunting and fishing]."[78] (Citations omitted.)

Next, the Court seemed to further limit the authority of tribes over non-Indians based on its decision in Oliphant v. Suquamish Indian Tribe.[79] The Court stated that:

---

[75] Id. at 550-57.

[76] Id. at 557-63.

[77] United States v. Wheeler, 435 U.S. 313 (1978).

[78] Montana, 450 U.S. at 564.

[79] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

> Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.[80]

Despite the sweeping nature of the foregoing proposition the Court then used equally broad language to describe the scope of jurisdiction over non-Indians retained by the tribes:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[81] (Citations omitted.)

The Court concluded that the Crow hunting and fishing regulations did not meet these criteria and therefore were invalid.[82]

Several subsequent cases interpreting Montana, have upheld tribal civil regulatory jurisdiction on fee lands over non-Indians in the context of tribal health and safety regulations[83] and land use zoning.[84]

---

[80] Montana, 450 U.S. at 565.

[81] Id. at 565-66.

[82] Id. at 566-67.

[83] See Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1981). In Cardin, the Ninth Circuit upheld the Quinalt Nation's application of tribal health and safety regulations to a non-Indian operating a grocery store on fee lands. The court observed that the store owner engaged in voluntary commercial dealings with the Tribe, and that the store owner's conduct threatened the health and welfare of the Tribe.

[84] In Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1981), the Tribes enacted a zoning ordinance and applied the ordinance to prohibit a non-Indian from subdividing and selling fee land for a residential development. The court held that the absence of land use control within the reservation, coupled with the tribal interest in

B. Tribal Authority to Enforce Environmental Statutes.

The courts have not yet resolved definitively the scope of tribal authority to enforce federal environmental statutes. Because, however, tribes may lawfully be delegated federal authority, the tribes and the EPA have developed a variety of schemes by which tribal interests are protected through federal regulation.

In Nance v. Environmental Protection Agency,[85] the Ninth Circuit reviewed an order of the EPA granting approval to the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I air quality standards under the Clean Air Act. Section 107(a) of the Clean Air Act,[86] allows states to designate air quality regions. Prior to 1977, no provision of the statute provided similar authority for tribes. In 1974, the EPA promulgated regulations governing the redesignation of air quality regions, including a provision by which a tribal government could redesignate its reservation. The Northern Cheyenne Tribe proposed in 1976 to have its reservation redesignated as Class I, under which very little deterioration of air quality is allowed. After conducting the required studies and hearings, the Tribe submitted its formal porposal on March 7, 1977. The EPA formally approved the redesignation by publication in the Federal Register on August 5, 1977, one day after the Clean Air Amendments of 1977 ("Amendments"),[87] were passed by Congress, but before the Amendments were signed into law.

The Ninth Circuit affirmed the EPA's approval of the Northern Cheyenne Tribe's redesignation of its reservation and held that the action

---

protecting their homeland from exploitation, justified the zoning code. Additionally, the court ruled that "[t]he fact that the code applies and affects non-Indians who cannot participate in tribal government is immaterial" because the developers' activities "directly affect Tribal and allotted lands." 670 F.2d at 903. The Ninth Circuit also upheld a tribal zoning ordinance as applied to fee lands within a reservation in Confederated Tribes and Bands of the Yakima Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987), cert. granted, 108 S.Ct. 2843 (1988). There the court upheld the Yakima Nation ordinance as applied in the "closed" area of the reservation where the vast majority of the land was tribally owned. The court remanded for further fact-finding the issues in the case relating to the application of the ordinance to that part of the reservation where the population was non-Indian. Certiorari was granted on June 20, 1988 and this case is now before the United States Supreme Court.

[85] Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), cert. denied sub nom, Crow Tribe of Indians, Montana v. Environmental Protection Agency, 454 U.S. 1081 (1981).

[86] 42 U.S.C. Section 7407(a).

[87] 42 U.S.C. Sections 7401-7642 (1982).

of the EPA was not arbitrary or capricious.[88] In reaching its decision, the court first resolved a series of challenges based on the procedures used to approve the redesignation. With respect to the procedural issues, the court ruled that: (i) the decision to redesignate was not arbitrary and capricious for failing to consider the impact on strip mining, even though the Amendments signed into law two days after the redesignation became effective raised the possibility that strip mining could be subjected to permit requirements, and that the redesignation would result in stricter requirements being imposed;[89] (ii) the EPA had "good cause" under under 5 U.S.C. Section 553(d) to make the redesignation effective immediately rather than after the usual thirty-day period, even though the EPA's clear motive was to bring the redesignation into effect prior to the enactment of the Amendments;[90] (iii) the EPA met the requirement of its regulations that actions affecting Indian trust lands be approved by the Department of Interior;[91] (iv) the EPA fulfilled its trust responsibility to the Crow Tribe by considering adequately the impact of the redesignation on the development of coal owned by the Crow Tribe;[92] and (v) the Analysis Document prepared by the Northern Cheyenne Tribe was sufficient and complied with EPA regulations.[93]

Next, the court adressed the issue of tribal jurisdiction. Several petitioners argued that the delegation of redesignation authority to tribes violated the Clean Air Act on the theory that Section 107(a) delegated the responsibility to the states "for assuring air quality within the entire geographic area comprising the state."[94] The court rejected that argument and responded as follows:

> The Indian Tribes have traditionally been regarded as possessing important attributes of sovereignty, and the power of the states to regulate Indians and Indian lands has been sharply curtailed. As this Court stated in Santa Rosa Band of Indians, "we have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose to grant that power." And it is well recognized that "Indian tribes possess an inherent

---

[88] Nance, 645 F.2d at 704.

[89] Id. at 706-708.

[90] Id. at 708-709.

[91] Id. at 709-710.

[92] Id. at 710-712.

[93] Id. at 712.

[94] Id. at 713.

> sovereignty except where it has been specifically taken away from them by treaty or act of Congress."[95] (Citations omitted.)

The court also relied on the principle that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[96] Additionally, the court stated that "tribal sovereignty provides 'a backdrop against which...applicable treaties and statutes must be read.'"[97] Thus, the court concluded that:

> [W]ithin the present context of reciprocal impact of air quality standards on land use, the states and Indian tribes occupying federal reservations stand on substantially equal footing. The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states. We cannot find compelling indications that the EPA's interpretation of the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decisionmaking.[98]

The petitioners also charged that the delegation of redesignation authority to the Tribe was unconstitutional. The petitioners attempted to distinguish Mazurie[99] on the grounds that here tribal authority to redesignate could result in effects off the reservation. Addressing this argument, the court stated:

> Certainly the exercise of sovereignty by the Northern Cheyenne Tribe will have extraterritorial effect. But another element must be considered, namely the effect of the land use outside the reservation on the reservation itself. This case involves the "dumping" of pollutants from land outside the reservation onto the reservation. Just as a tribe has the authority to prevent the entrance of non-members onto the reservation, a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation. We

---

[95] Id. at 713.

[96] Id. at 714.

[97] Id. at 714.

[98] Id. at 714.

[99] United States v. Mazurie, 419 U.S. 544 (1975).

> do not, however, decide whether the Indians would possess independent authority to maintain their air quality. "It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority."
>
> We note further that while the Clean Air Act permits delegation of redesignation authority to the Indian tribes, the EPA maintains certain checks on the exercise of that authority. EPA regulations require approval of a proposed reclassification by the EPA administrator; the tribes must prepare a report discussing the social, environmental, and economic effects of the redesignation; a public hearing must be held on the Report; and consultation is required with states and tribes that border the reservation of the tribe proposing the redesignation.[100] (Citations omitted.)

III. STATE AUTHORITY TO ENFORCE ENVIRONMENTAL LAWS IN INDIAN COUNTRY

As noted in Section II, primary enforcement responsibility may be delegated to states under most federal environmental regulatory statutes. In developing these statutory schemes, Congress failed to consider the regulatory authority of tribal governments and the limited nature of state authority on Indian reservations. Before a state may assume primary enforcement responsibilities for federal environmental laws on reservations, the state must demonstrate to EPA's satisfaction that the state has jurisdiction. This Section describes the law of state civil regulatory jurisdiction in Indian country.

A. Preemption of State Regulatory Authority in Indian Country.

Recognition of tribal sovereignty does not serve as a complete bar to the assertion of state authority in Indian country. Recent cases indicate that courts are increasing their reliance on preemption as a method for resolving jurisdictional questions involving tribes and states. Under principles of preemption, state regulatory laws cannot be applied to Indian reservations if their application will interfere with the achievement of the policy goals underlying federal laws relating to Indians. Where tribal and federal interests are adequately protected and the state has a strong regulatory interest, state laws can be applied to Indian reservations, at least as to non-Indian activities on fee lands.

---

[100] Nance, 645 F.2d at 715.

The United State Supreme Court recently articulated the preemption analysis in California v. Cabazon Band of Mission Indians,[101] to decide the issue of state regulatory jurisdiction within reservation boundaries. There two tribes conducted bingo games on their reservations which were open to the public and played predominately by non-Indians. California law allowed charitable organizations to conduct bingo games, but prohibited prizes in excess of $250. The games conducted by the two tribes paid much higher jackpots. California insisted that the tribes bring their games into compliance with California law. The tribes sued in federal district court for declatory and injunctive relief.

The United States Supreme Court held that "the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them."[102] Further, the Court held that "[s]tate regulation would impermissibly infringe on tribal government...."[103]

The Court first ruled that neither Public Law 280,[104] nor the Organized Crime Act,[105] authorized states to apply their regulatory laws governing gambling to Indian tribes on their reservations.[106] The tribes urged that, in the absence of express congressional consent, states cannot apply their regulatory laws to Indians on Indian reservations. The Court disagreed and set forth the following preemption analysis:

> Our cases, however, have not established an inflexible per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent....
>
> Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted...if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." The inquiry is to proceed in light of traditional

---

[101] California v. Cabazon Band of Mission Indians, 107 S.Ct. 1083 (1987).

[102] Id. at 1095.

[103] Id.

[104] 18 U.S.C. Section 1162, 28 U.S.C. Section 1360.

[105] 18 U.S.C. Section 1955.

[106] Cabazon Band of Mission Indians, 107 S.Ct. at 1087-91.

> notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.[107] (Citations omitted.)

In identifying the federal and tribal interests involved, the Court found that the federal government had pursued a policy of promoting tribal bingo enterprises through loans and other financial assistance and through federal regulation of tribal bingo management contracts. The Court noted that the bingo games were the only sources of revenue for the two tribal governments, and as such, the tribes possessed a substantial interest in the bingo activities.[108] California asserted the need to prevent the infiltration of organized crime in the tribal games as its sole interest in regulating the bingo enterprises. However, because California presented no evidence of such infiltration, the Court ruled that this concern was insufficient to "escape the pre-emptive force of federal and tribal interests."[109]

B. Preemption Applied In the Enforcement of Environmental Laws and the Regulation of Natural Resources on Reservations.

The courts thus far have prohibited the application of state environmental laws to Indian reservations. However, the question of whether such laws may be applied to non-Indians on fee lands within reservation boundaries remains unresolved.

State of Washington Department of Ecology v. United States Environmental Protection Agency,[110] addresses the issue of whether a federal environmental statute conveys authority to a state, not only over state lands, but also over tribal lands. Section 3006 of the RCRA[111] authorizes states to establish hazardous waste management programs "in lieu of" the federal program administered by the EPA that otherwise would apply. The State of Washington submitted an application to the EPA to assume primary enforcement responsibility for the RCRA, including enforcement on Indian lands within the State. The EPA approved

---

[107] Id. at 1091-92.

[108] Id. at 1092-1094.

[109] Id. at 1094.

[110] State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1495 (9th Cir. 1985).

[111] Resource Conservation and Recovery Act, 42 U.S.C. Section 6926.

Washington's primacy application "except as to Indian lands."[112] The EPA retained to itself jurisdiction to operate the program "on Indian lands in the State of Washington."[113] Washington petitioned the Ninth Circuit Court of Appeals for review of the decision to exclude Indian lands from the State program.

The Ninth Circuit held that the Regional Administrator of the EPA properly refused to approve the State program as applied to Indians on Indian lands. However, the court declined to address the issue of whether the State could apply its program to non-Indians in Indian country.[114]

The court first examined the statutory language and legislative history of the RCRA. The court found the RCRA ambiguous as to whether states could regulate hazardous wastes on Indian reservations. Although tribes were defined as being among those "persons" to whom the enforcement provisions of the RCRA applied, the statute was silent as to the authority of states to enforce their hazardous waste regulations against Indian tribes or individuals on Indian land.[115] Additionally, the court found nothing in the legislative history on the issue of state regulatory jurisdiction on reservations.

The court set out a deferential standard for resolving the ambiguities in the statute as follows:

> When a statute is silent or unclear with respect to a particular issue, we must defer to the reasonable interpretation of the agency responsibile for administering the statute. By leaving a gap in the statute, Congress implicitly has delegated policy-making authority to the agency....[W]e may not substitute our judgment for that of the agency as long as the agency had adopted a reasonable construction of the statute.[116]

Applying this standard, the court ruled that the EPA reasonably interpreted the RCRA as not granting "state jurisdiction over the activities of Indians in Indian country."[117] The court buttressed its ruling with well-settled principles of Indian law. The court stated that "[s]tates are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it."[118] Additionally, the court noted that federal retention of authority over Indian lands is consistent with the United State's trust responsibility to tribes.[119] The court stated:

---

[112] See 48 Fed. Reg. 34954 (1983).

[113] Id. at 34957.

[114] The court noted that the State program presented by Washington proposed that its program would apply to the activities of all persons, Indians and non-Indians, on Indian lands. Because the program did not propose to reach only non-Indians in Indian country, the court was limited to review only of the program Washington did present. Washington Department of Ecology, 752 F.2d at 1468.

[115] Id. at 1469.

[116] Id. at 1469.

> The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policymaking or program administration or both....The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.[120]

The court cited both the President's Statement of January 24, 1983, on Indian Policy and the December 19, 1980, EPA Policy for Program Implementation on Indian Lands. The court also cited the Nance[121] approval of the EPA's efforts to promote tribal self-government in environmental matters.

In declining to subordinate tribes to state authority, the court further stated that:

> [T]he tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsiblity are controlling. We cannot say that RCRA clearly envinces a Congressional purpose to revise federal Indian policy or diminish the independence of Indian tribes....
>
> We therefore conclude that EPA correctly interpreted RCRA in rejecting Washington's application to regulate all hazardous waste-related activities on Indian lands. We recognize the vital interest of the State of Washington in effective hazardous waste

---

[117] Id. at 1469.

[118] Id. at 1469-1470.

[119] Id. at 1470.

[120] Id. at 1471.

[121] Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981).

> management throughout the state, including on Indian lands. The absence of state enforcement power over reservation Indians, however, does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal statutes are met on the reservations. Those standards are designed to protect human health and the environment. The state and its citizens will not be without protection.[122] (Citations omitted.)

The issue of state regulatory jurisdiction in Indian country has also been addressed by courts in the context of suits involving non-Indians, water rights and state water permits. In Colville Confederated Tribes v. Walton,[123] the Colville Confederated Tribes brought an action to enjoin Walton, a non-Indian owner of land within the Colville Reservation, from using surface and ground waters in the No Name Creek Basin. The Basin and Creek were located wholly within the Reservation. The State of Washington intervened, asserting authority to grant water permits on reservation lands. The district court held that the State could regulate water in the basin that was not reserved for the Tribes under the Winters doctrine.

The Ninth Circuit held that Washington has no regulatory authority over water in the No Name System and therefore, the state permits issued to Walton are of no force.[124] The court noted that state regulatory authority may be barred on Indian reservations when such authority either is preempted by federal law or unlawfully infringes on the Indian tribe's right to self-government.[125] The court then discussed tribal interests in water regulation on the reservation:

> A tribe retains inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribe's water rights.
>
> A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Waltons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among

---

[122] Id. at 1472.

[123] Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981).

[124] Id. at 51.

[125] Id.

> other things....
>
> Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.
>
> Although we need not decide whether this power resides exclusively in the tribe or the federal government, or whether it may be exercised by them jointly, its importance forms the backdrop for our consideration of the pre-emption issue.[126] (Citations omitted.)

The court then ruled that the State's regulatory authority over the No Name System was preempted by the creation of the Reservation. The court stated:

> The geographic facts of this case make resolution of this issue somewhat easier than it otherwise might be. The No Name System is non-navigable and is entirely within the boundaries of the reservation. Although some of the water passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries.
>
> The Supreme Court has held that water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority. Thus, in creating the Colville Reservation, the federal government pre-empted state control of the No Name System.[127] (Citations omitted.)

The Ninth Circuit again addressed state regulatory jurisdiction over water use on an Indian reservation in United States v. Anderson.[128] There the United States filed an action to quantify the reserved rights of the Spokane Tribe to water in the Chamokane Basin. The Chamokane Creek originates north of the Reservation and passes through it. The district court ruled that the State could regulate the use of "excess" water, i.e. water not reserved for the use of the Tribe. The Tribe appealed.

---

[126] Id. at 52.

[127] Id. at 52-53 (citing, Federal Power Commission v. Oregon, 349 U.S. 435 (1955)).

[128] United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

The Ninth Circuit held "that the State, not the Tribe, has the authority to regulate the use of excess Chamokane Basin waters by non-Indians on non-tribal, i.e., fee land."[129] The court first ruled that the Tribe could not assert jurisdiction under the rule set forth in Montana:[130]

> Our review reveals no consensual agreement between the non-Indian water users and the Tribe which would furnish the basis for implication of tribal regulatory authority. We find no conduct which so threatens or has such a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe," as to confer tribal jurisdiction. The water rights adjudication which furnishes the basis for the instant inquiry quantifies and preserves tribal water rights. The district court appointed a federal water master whose responsibility is to administer the available waters in accord with the priorities of all the water rights as adjudicated....
>
> The tribe is, of course, entitled to utilize its water for any lawful purpose. If the tribe chooses to use water reserved for irrigation in a non-consumptive manner, it does not thereby relinquish any of its water rights to state permittees or subject the exercise of its rights to state regulation. The state may regulate only the use, by non-Indian fee owners, of excess water. Any permits issued by the state would be limited to excess water. If those permits represent rights that may be empty, so be it.[131]

The court next distinguished Colville Confederated Tribes v. Walton:[132]

> By weighing the competing federal, tribal and state interests involved, it is clear that the state may exercise its regulatory jurisdiction over the use of surplus, non-reserved Chamokane Basin water by nonmembers on non-Indian fee lands within the Spokane Indian Reservation. Central to our decision is the fact that the interest of the state in

---

[129] Id. at 1365.

[130] Montana v. United States, 450 U.S. 544 (1981).

[131] Anderson, 736 F.2d at 1365.

[132] Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981).

> exercising its jurisdiction will not infringe on the tribal right to self-government nor impact on the Tribe's economic welfare because those rights have been quantified and will be protected by the federal water master. Additionally, in view of the the hydrology and geography of the Chamokane Creek Basin, the State of Washington's interest in developing a comprehensive water program for the allocation of surplus waters weighs heavily in favor of permitting it to extend its regulatory authority to the excess water, if any, of the Chamokane Basin. State permits issued for any such excess water will be subject to all preexisting rights and those preexisting rights will be protected by the federal court decree and its appointed water master. We do not believe there is any realistic infringement on tribal rights and protected affairs. If there is any intrusion, it is minimal and permissible under all of the circumstances of this case.[133]

IV. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY INDIAN POLICY

The jurisdictional rules applicable to Indian country leave the EPA unable to pursue its usual practice of delegating primary enforcement responsibility to states that so request where Indian reservations are concerned. Moreover, until recently, none of the major federal regulatory statutes provided for delegation to tribal governments. In short, the EPA was forced to develop special rules and practices concerning environmental regulation on Indian reservations. To address these special circumstances, in November of 1984, the EPA issued the EPA Policy for the Administration of Environmental Programs on Indian Reservations (the "Indian Policy").[134] This Section briefly highlights significant features of the Indian Policy.

The stated purpose of the Indian Policy is "to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal `self-government' and `government-to-government' relations between Federal and Tribal Governments" and to improve the "environmental quality on reservation lands."[135]

The Indian Policy clearly assumes that tribal governments should be the primary decision-makers on environmental matters arising on Indian reservations and expressly states that:

---

[133] Id. at 1366.

[134] EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984.

[135] Id. at 1.

> The keynote of this effort [to protect human health and the environment] will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands.[136]

The Indian Policy sets forth the following nine principles by which the EPA will pursue its objectives:

> 1. The Agency stands ready to work directly with Indian Tribal Governments on a one-to-one basis (the "government-to-government" relationship), rather than as subdivisions of other governments....
>
> 2. The Agency will recognize Tribal Governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations....
>
> 3. The Agency will take affirmative steps to encourage and assist Tribes in assuming regulatory and program management responsibilities for reservation lands....
>
> 4. The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with Tribal Governments on reservation programs....
>
> 5. The Agency, in keeping with the Federal Trust Responsibility, will assure that Tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect Tribal environments....
>
> 6. The Agency will encourage cooperation between Tribal, State, and Local Governments to resolve environmental problems of mutual concern....
>
> 7. The Agency will work with other Federal agencies which have responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help Tribes assume environmental program responsibilities for reservations....

---

[136] Id.

> 8. The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations....
>
> 9. The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes....[137]

The Indian Policy appears to contemplate that unitary regulatory systems governing both Indians and non-Indians are to be developed, as indicated by the constant references to "Indian reservations" rather than "Indian lands." To the extent it reflects official congressional policy towards tribal governments, the Indian Policy may have the effect of preempting state regulatory authority as to the matters to which the policy is directed.

The EPA's prior policy of working with tribal governments, even in the absence of explicit statutory authority was specifically approved by the Ninth Circuit in Nance[138] and Washington Department of Ecology.[139] In line with this prior practice, the Indian Policy states that the EPA will assist interested tribes in developing programs and in assuming regulatory environmental management over reservations. This assistance will include making grants to tribes similar to those currently available to State Governments.

Finally, with respect to jurisdictional issues, the Indian Policy states that until tribes assume full responsibility for delegable programs, the EPA will retain responsibility for reservations unless the State has received an express grant of jurisdiction from Congress. The Indian Policy also makes clear the EPA's view that all federal environmental regulatory statutes apply to Indian reservations and are enforceable against Indians and even Indian tribes. The Indian Policy acknowledges that impediments to tribal assumption of delegable programs exist in the language of present procedures, regulations, and statutes and states that EPA will work to remove such impediments.

---

[137] Id. at 2-4.

[138] Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981).

[139] State of Washington Department of Ecology v. United States Department of Ecology, 752 F.2d 1465 (9th Cir. 1985).

V. ENFORCEMENT OF FEDERAL ENVIRONMENTAL REGULATORY LAWS ON INDIAN RESERVATIONS

As described in the previous Sections, federal environmental regulatory statutes as initially conceived did not provide for the delegation of primary enforcement responsibility to Indian tribes. In 1985, representatives of tribal governments began working with Congress to develop amendments to the Safe Drinking Water Act and Federal Water Pollution Control Act to specifically authorize such delegations.[140] Even in the absence of express statutory authority to delegate to Indian governments, the EPA has authorized tribes to assume responsibility for environmental decision-making. This Section recites provisions relating to tribal regulation in the five major federal environmental regulatory statutes administered by the EPA.

A. Statutes Amended to Provide for Tribal Regulation.

1. Safe Drinking Water Act[141]

The Safe Drinking Water Act was amended in 1986 to allow tribes to be treated as states for SDWA programs. 42 U.S.C. Section 300j-11 now provides as follows:

> Section 300j-11. Indian Tribes
>
> (a) In general. Subject to the provisions of subsection (b) of this section, the Administrator--
>
> > (1) is authorized to treat Indian Tribes as States under this title,
> > (2) may delegate to such Tribes primary enforcement responsiblity for public water systems and for underground injection control, and
> > (3) may provide such Tribes grant and contract assistance to carry out functions provided by this title.
>
> (b) EPA Regulations. (1) Specific provisions. The Administrator shall, within 18 months after the enactment of the Safe Drinking Water Act Amendments of 1986, promulgate final regulations specifying those provisions of this title for which it is

---

[140] As previously noted, Congress amended the Clean Air Act in 1977 to authorize tribes to redesignate their reservations for air quality purposes. Enforcement authority, however, was not addressed in the 1977 amendments.

[141] Safe Drinking Water Act, 42 U.S.C. Sections 300f-300j-12 (1982).

appropriate to treat Indian Tribes as States. Such treatment shall be authorized only if:

> (A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
> (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and
> (C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with all the terms and purposes of this title and of all applicable regulations.

(2) Provisions where treatment as state inappropriate. For any provision of this title where treatment of Indian Tribes as identical to States is inappropriate, administratively infeasible [illegible] otherwise inconsistent with the purposes [illegible] this title, the Administrator may include in the regulations promulgated under this section, other means for administering such provision in a manner that will achieve the purpose of the provision. Nothing in this section shall be construed to allow Indian Tribes to assume or maintain primary enforcement responsibility for public water systems or for underground injection control in a manner less protective of the health of persons that such responsibility may be assumed or maintained by a State. An Indian tribe shall not be required to exercise criminal enforcement jurisdiction for purposes of complying with the preceding sentence.[142]

Proposed regulations for National Primary Drinking Water and Underground Injection Control Standards were published on July 27, 1987.[143] Final rules were published in the Federal Register on September 26, 1988.[144]

The National Primary Drinking Water Regulations now provide:

---

[142] 42 U.S.C. Section 300j-11.

[143] 52 Fed. Reg. 28112 (1987).

[144] 53 Fed. Reg. 37396 (1988).

Subpart H - Treatment of Indian Tribes as States

Section 142.72 Requirements for treatment as a State.

The Administrator is authorized to treat an Indian Tribe as a State (for the purposes of making the Tribe eligible to apply for a Public Water System Program) if it meets the following criteria:

(a) The Indian Tribe is recognized by the Secretary of the Interior.

(b) The Indian Tribe has a tribal governing body which is currently "carrying out substantial governmental duties and powers" over a defined area. (i.e., is currently performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographic area).

(c) The Indian Tribe demonstrates that the functions to be performed in regulating the public water systems that the applicant intends to regulate are within the area of the Indian Tribal government's jurisdiction.

(d) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of administering (in a manner consistent with the terms and purposes of the Act and all applicable regulations) an effective Public Water System program by the existence of management and technical skills necessary to administer an effective Public Water System program or a plan to acquire the additonal management and/or technical skills to administer an effective Public Water System program; by the existence of institutions to exercise executive, legislative, and judicial functions; by a history of successful managerial performance of public health or environmental programs; and by acceptable accounting and procurement procedures.

Section 142.76 Request by an Indian Tribe for a determination of treatment as a State.

An Indian Tribe may apply to the Administrator for a determination that it qualifies for treatment as a State pursuant to section 1451 of the Act. The application shall be concise and describe how the Indian Tribe will meet each of the requirements of Section 142.72. The application shall consist of the following information:

(a) A statement that the Tribe is recognized by the Secretary of the Interior.

(b) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement shall:

(1) Describe the form of the Tribal government;
(2) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and
(3) Identify the sources of the Tribal government's authority to carry out the governmental functions currently being performed.

(c) A map or legal description of the area over which the Indian Tribe asserts jurisdiction; a statement by the Tribal Attorney General (or equivalent official) which describes the basis for the Tribe's jurisdictional assertion (including the nature or subject matter of the asserted jurisdiction); a copy of all documents such as Tribal constitutions, by-laws, charter, executive orders, codes, ordinances, and/or resolutions which support the Tribe's asserted jurisdiction; and a description of the locations of the public water systems the Tribe proposes to regulate.

(d) A narrative statement describing the capability of the Indian Tribe to administer an effective Public Water System program. The narrative statement shall include:

(1) A description of the Indian Tribe's previous management experience including, but not limited to, the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facilities Construction Activity Act (42 U.S.C. 2004a).

(2) A list of existing environmental or public health programs administered by the Tribal governing body and a copy of related Tribal laws, regulations and policies.
(3) A description of the Indian Tribe's accounting and procurement systems.
(4) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government.
(5) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary enforcement responsibility, including a description of the relationship between owners/operators of the public water systems and the agency.
(6) A description of the technical and administrative capabilities of the staff to administer and manage an effective Public Water System Program or a plan which proposes how the Tribe will acquire additonal administrative and/or technical expertise. The plan must address how the Tribe will obtain the funds to acquire the additional administrative and technical expertise.

(e) The Administrator may, in his discretion, request further documentation necessary to support a Tribal request for treatment as a State.

(f) If the Administrator has previously determined that a Tribe has met the requirement for "treatment as a State" for programs authorized under the Safe Drinking Water or the Clean Water Acts, then that Tribe may provide only that information unique to the Public Water System program.

Section 142.76 Procedure for processing an Indian Tribe's application for treatment as a State.

(a) The Administrator shall process a completed application of an Indian Tribe for treatment as a State submitted pursuant to Section 142.76 in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(b) Within 30 days after receipt of the Indian Tribe's completed application for treatement as a State, the Administrator shall notify the

> appropriate governmental entities. Notice shall include information on the substance of and basis for the Tribe's jurisdictional assertions.
>
> (c) Each governmental entity so notified by the Administrator shall have 30 days to comment upon the Tribe's assertion of jurisdiction. Comments by governmental entities shall be limited to the Tribe's assertion of jurisdiction.
>
> (d) If a Tribe's asserted jurisdiction is subject to a competing or conflicting claim, the Administrator, after consultation with the Secretary of the Department of the Interior, or his designee, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated the requisite jurisdiction for primacy for the Public Water System Program.
>
> (e) If the Administrator determines that a Tribe meets the requirements of Section 142.72, the Indian Tribe is then eligible to apply for grants and primary enforcement responsiblity for a Public Water System Program and associated funding under [S]ection 1443(a) of the Act and for primary enforcement responsibility under [S]ection 1413 of the Act.[145]

Similar regulations authorizing treatment of Indian Tribes as States for Underground Injection Control Programs also were approved.[146] The following commentary from the background to the final rules explains how the EPA views its responsibility to tribes under the 1986 amendments:

> The Agency does not believe that the 1986 Amendments mandate establishment of an "affirmative action program" to assist Indian Tribes, in general, to meet the criteria for "treatment as a State." The scope of EPA's "responsibility," however charaterized, is defined by the language of the 1986 Amendments and the provisions of the Safe Drinking Water Act. The EPA believes that its statutory responsibility under the 1986 Amendments is to promulgate regulatory requirements which afford eligible Indian Tribes a fair and reasonable opportunity to attain primacy for Public Water System and/or Underground Injection Control Programs and, at the same time, ensure that Tribes

---

[145] 53 Fed. Reg. 37411-37412 (1988).

[146] 53 Fed. Reg. 37412-37413 (1988) (adding new Subpart E to Part 145).

> assume and maintain primacy in a manner which is "no less protective of the public health than such responsiblity may be assumed or maintained by a State." These regulations are consistent with that mandate and with the EPA's Indian Policy Statement.[147]

In summary, these regulations establish the following three-step process by which tribes may assume primary responsibility for enforcement of the Public Water System and Underground Injection Control programs: (1) obtain designation for "treatment as a State;"[148] (2) apply for a grant to develop a program; and (3) receive primacy.

2. The Clean Water Act[149]

The Clean Water Act was amended in 1987 to allow tribes to be treated as states for certain purposes. 42 U.S.C. Section 1377 now provides:

> Section 1377. Indian Tribes
>
> (a) Policy. Nothing in this section shall be construed to affect the application of section 1251(g) of this Act, and all provisions of this section shall be carried out in accordance with the provision of such section 1251(g).
>
> (b) Assessment of sewage treatment needs; report. The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to Indian tribes to develop waste treatment management plans and to construct treatment works under this chapter and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be

---

[147] 53 Fed. Reg. 37408 (1988).

[148] 53 Fed. Reg. 37398 (1988).

[149] Clean Water Act, 33 U.S.C. Sections 1251-1387 (1982) (previously known as the Federal Water Pollution Control Act).

maximized.

(c) Reservation of funds. The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one-half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of water treatment management plans and for the construction of sewage treatment works to serve Indian tribes.

(d) Cooperative agreements. In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

(e) Treatment as States. The Administrator is authorized to treat an Indian Tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section, but only if---

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or is otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of the cost of a project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specifiy how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of an unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objectives of this chapter.

(f) **Grants for nonpoint source programs.** The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

(g) **Alaska Native organizations.** No provision of this chapter shall be construed to---

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the

> Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;
> (2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or
> (3) in any way affect any assertion that Indian country, as defined in section 1151 of Title 18, exists or does not exist in Alaska.

(h) Definitions. For purposes of this section, the term---

> (1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and
> (2) "Indian tribe" means an Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.[150]

Under the amendments, tribes may be treated as states for purposes of inter alia, the following: (a) grants for pollution control programs under Section 1256; (b) grants for construction of treatment works under Section 1281-1299; (c) water quality standards and implementation plans under Section 1313; (d) enforcement of standards under Section 1319; (e) clean lake programs under Section 1324; (f) certification of National Pollutant Discharge Elimination System ("NPDES") permits under Section 1341; (g) issuance of NPDES permits under Section 1342; and (h) issuance of permits for dredged or fill material under Section 1344.

The amendments require the EPA to issue regulations implementing the new provisions by August 4, 1988. The EPA has formed three working groups that have circulated drafts of proposed regulations. No proposed regulations have yet been formally published.

---

[150] 33 U.S.C. Section 1377.

3. Clean Air Act[151]

While Nance v. Environmental Protection Agency[152] was pending, Congress amended the Clean Air Act to allow tribes to redesignate their reservations for purposes of determining applicable air quality standards. 42 U.S.C. Section 7474 provides in relevant part as follows:

> **Section 7474. Area Redesignation**
>
> **(a) Authority of States to redesignate areas.** Except as otherwise provided under subsection (c), a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II:
>
> > (1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and
> >
> > (2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.
> >
> > Any area (other than area referred to in paragraph (1) or (2) or an area established as class I under the first sentence or section 7472(a) of this title) may be redesignated by the State as class III if---
> >
> > > (A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of

---

[151] Clean Air Act, 42 U.S.C. Sections 7400-7642 (1982).

[152] Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981).

> local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring in the State's redesignation;
>
> (B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and
>
> (C) such redesignation otherwise meets the requirements of this part.
>
> Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

...

(c) Indian reservations. Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respects to the provisions of subsection (e) of this section.

...

(e) Resolution of disputes between States and Indian Tribes. If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute.

> If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.[153]

Indian tribes continue to be unrecognized for other provisions of the Clean Air Act.

B. Statutes as to Which Administrative Action Provides for Tribal Participation.

1. Federal Insecticide, Fungicide and Rodenticide Act[154]

7 U.S.C. Section 136b(a)(2) allows states to assume responsibility for certifying persons who apply pesticides registered under the Act. 7 U.S.C. Section 136w-1 provides for state primary enforcement responsibility for pesticide use violations under the Act. Unlike the amendments to the Safe Drinking Water Act,[155] and the Clean Water Act,[156] the FIFRA contains no express provision for "the treatment of Indian tribes as states." However, certain provisions of the Act relating to funding, training, and certification programs have been extended to Indian tribes as follows:

> **Section 136u. State cooperation, aid, and training**
>
> **(a) Cooperative agreements.**---The Administrator may enter into cooperative agreements with States and Indian tribes---
>
> (1) to delegate to any State or Indian tribe the authority to cooperate in the enforcement of this subchapter through the use of its personnel or facilities,

---

[153] 42 U.S.C. Section 7474.

[154] Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Sections 136-136y (1982).

[155] 42 U.S.C. Sections 300f-300j-12 (1982).

[156] 33 U.S.C. Sections 1251-1387 (1982).

> > to train personnel of the State or Indian tribe to cooperate in the enforcement of this subchapter, and to assist States and Indian tribes in implementing cooperative enforcement programs though grants-in-aid; and
> >
> > (2) to assist States in developing and administering State programs, and Indian tribes that enter into cooperative agreements, to train and certify applicators consistent with the standards the Administrator prescribes.
>
> Effective with the fiscal year beginning October 1, 1978, there are authorized to be appropriated annually such funds as may be necessary for the Administrator to provide through cooperative agreements an amount equal to 50 percent of the anticipated cost to each State or Indian tribe, as agreed to under such cooperative agreements, of conducting training and certification programs during such fiscal year. If funds sufficient to pay 50 percent of the costs for any year are not appropriated, the share of each State and Indian tribe shall be reduced in a like proportion in allocating available funds.
>
> **(b) Contracts for training.**---In addition, the Administrator may enter into contracts with Federal, State, or Indian tribal agencies for the purpose of encouraging the training of certified applicators.[157]

On March 12, 1975, the EPA issued regulations that allowed tribes to assume responsibility for certifying applicators.[158] Those regulations provide:

> Section 171.10. Certification of Applicators on Indian Reservations.
>
> (a) On Indian Reservations not subject to State jurisdiction the appropriate Indian governing body may choose to utilize the State certification program, with the concurrence of the State, or develop its own plan for certifying private and commercial applicators to use or supervise the use of restricted use pesticides.
>
> (1) If the Indian Governing Body decides

---

[157] 7 U.S.C. Section 136u(a) and (b).

[158] 40 Fed. Reg. 11704 (1975).

> to utilize the State certification program, it should enter into a cooperative agreement with the State. This agreement should include matters concerning funding and proper authority for enforcement purposes. Such agreement and any amendments thereto shall be incorporated in the state plan, and forwarded to the Administrator for approval or disapproval.
> (2) If the Indian Governing Body decides to develop its own certification plan, it shall be based on either Federal standards (Sections 171.1 through 171.8) or State standards for certification which have been accepted by EPA. Such a plan shall be submitted through the United States Department of the Interior to the EPA Administrator for approval.
>
> (b) On Indian Reservations where the State has assumed jurisdiction under other federal laws, anyone using or supervising the use of restricted use pesticides shall be certified under the appropriate State certification plan.
>
> (c) Non-Indians applying restricted use pesticides on Indian Reservations not subject to State jurisdiction shall be certified either under a State certification plan accepted by the Indian Governing Body or under the Indian Reservation certification plan.
>
> (d) Nothing in this section is intended to either confer or deny jurisdiction to the States over Indian Reservations not already conferred or denied under other laws or treaties.[159]

C. Statutes Not Providing for Tribal Participation.

1. Resource Conservation and Recovery Act[160]

RCRA does not provide specifically for delegation of program authority to tribal governments. In State of Washington Department of

---

[159] 40 C.F.R. Section 171.10 (1987).

[160] Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901-6991i (1982).

Ecology v. United States Environmental Protection Agency,[161] the court noted that:

> EPA, having retained regulatory authority over Indian lands in Washington under the interpretation of RCRA that we approve today, can promote the ability of the tribes to govern themselves by allowing them to participate in hazardous waste management. To do so, it need not delegate its full authority to the tribes. We therefore need not decide, and do not decide, the extent to which program authority under Section 3006 of RCRA is delegable to Indian governments. It is enough that EPA remains free to carry out its policy of encouraging tribal self-government by consulting with the tribes over matters of hazardous waste policy, such as the siting of disposal facilities. ... Other avenues of accommodating tribal sovereignty will doubtless become clear in the concrete administration of the federal program. The "backdrop" of tribal sovereignty, in light of federal policies encouraging Indian self-government, consequently supports EPA's interpretation of RCRA.[162] (Citations omitted.)

VI. CONCLUSION

Although federal environmental laws, as originally enacted, failed to address the regulatory authority of tribal governments and the limited nature of state authority in Indian country, the current view of Congress, the courts, and the EPA is that states do not have jurisdiction to enforce environmental laws on reservations. With respect to the recently amended statutes, described above in Section V.A., which allow tribes to assume responsibility for delegable programs, state authority over Indian country is effectively foreclosed. In accordance with the objectives set forth in the EPA Indian Policy,[163] presumably other federal environmental laws will be amended to expressly provide for the delegation of primary enforcement responsibility to Indian tribes. As these legislative impediments are eliminated, tribal governments must stand ready to shoulder the responsibility for environmental regulation over tribal lands.

---

[161] State of Washington Department of Ecology Department v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

[162] Id. at 1472.

[163] EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984.

Wind River Indian Reservation
Summary of Tribal Concerns Regarding EPA's Activities

Prepared by the Wind River Environmental Quality Commission
P.O. Box 217, Ft. Washakie, Wyoming

This document summarizes some of the major concerns of the Shoshone and Arapaho tribes regarding the activities and policies of the U.S. Environmental Protection Agency in relation to the management and protection of the environment on Indian lands. The information described here is derived from direct tribal experiences with EPA Region 8 and is also obtained from a national meeting held in February, 1989 whose purpose was to discuss the experiences and record of EPA regarding the protection of Indian resources.

1. Context for Environmental Concerns at Wind River

The Wind River Indian reservation is a 2.1 million acre reservation located in west central Wyoming. The reservation has over 147 lakes, several hundred streams totaling more than 1,000 stream miles, and several large aquifers beneath its land base. As a result of its size and the nature of industrial and agricultural development on reservation lands, the reservation embodies a wide range of environmental problems that pose serious threats to the health and welfare of tribal residents and resources. For example, over 200 injection wells presently inject waste fluids into subsurface aquifers, many of which have less than 700 parts per million total dissolved solids (TDS). Injection activities are associated with the large scale oil and gas development in 5 major oil fields on the reservation; brine pits and waste disposal into reservation streams also pose problems. Another pending problem is high selenium concentrations in agricultural waste waters affecting reservation streams. With several Class I (or trophy) streams on the reservation supporting several different types of fish, non-point pollution sources form a major threat to tribal resources.

Finally, we mention the potential air quality problems existing on reservation, including acid rain impacting the high mountain lakes and a uranium tailings pile affecting radon concentrations in Arapaho communities.

The recent 1988 Wyoming State Supreme Court decision, which quantified the tribes' water rights, poses significant managerial challenges to the tribes: the tribes must develop policies and procedures to protect and manage this hard fought-for water. Seen in this context, EPA assistance was sought in the development of baseline data, underground injection controls and water quality standards.

2. Requests for Financial Assistance from EPA: The Record of Response and Action

In the last year, the Wind River tribes have sought funding from EPA through the various mechanisms outlined by the agency in its guidelines for implementing the agency's Indian Policy. The tribes submitted a proposal for Underground Injection Control funds under the Direct Implementation program of EPA in June 1988 and submitted a proposal for Section 106 funds in July, 1988.

The record of response of EPA to both these proposals has been dismal. First, with regard to the UIC grant, the tribes were told continuously that the monies were available, and that all that was needed was for EPA to complete the necessary internal paper work for this grant. At the time of submission of the proposal, there was no requirement for the tribes to prepare or submit the forms for the treatment as a state designation, inasmuch as the funding was to go directly to the Indian Health Service (IHS) and then to the tribes.

In February, 1989, EPA informed the tribes that the monies were to be made available shortly, however, in March 1989, EPA informed the tribes that there would be no grant in this area to the tribes. The reason given is that the tribes never applied for treatment as a state, and that this was a "requirement for direct implementation monies". When queried about this requirement, EPA officials sited the September 1988 federal register and its regulations regarding treatment as a state. When the same officials were asked why they did not inform the tribes about these changes so that any application could have been rewritten, the officials insisted that "it was not our jobs to inform you of these changes". In any case, direct implementation monies do not require the tribes to submit an application for treatment as a state.

With regard to the Section 106 proposal, EPA has not contacted any tribal agency or legal representative regarding its status. Additionally, as long as EPA drags its feet on the development and implementation of regulations that will allow tribes to qualify for 106 monies, no tribe will be able to move on the development of critically-needed water quality information.

In short, EPA has been particularly unresponsive to the needs and requests of the WRIR, the largest Indian reservation in Region 8. EPA's neglect and lack of assistance on the development of funding proposals borders on dishonesty and certainly reflects a lack of respect or concern for tribal environmental issues. The unfortunate aspect is that this general lack of response seems to be a pervasive characteristic of EPA.

These concerns were echoed by tribal representatives from 10 reservations who attended the February meeting sponsored by the Wind River Environmental Quality Commission. Among the most pertinent comments were those directed toward (a) lack of agency response, (b) lack of direct technical assistance to tribes, (c) lack of effective communication, (d) misleading statements, false promises and lack of follow-up, and (e) the pervasively low level of funding for the development of tribal environmental programs.

3. Aquifer Exemptions

In November 1988, EPA exempted several aquifers on the Wind River Indian reservation from regulation under EPA's underground injection control program. Although many of the aquifers exempted are considered potable aquifers (with less than 500 ppm TDS), EPA exempted these aquifers based on the extensive oil and gas development in the region.

However, examination of the water resources information available for the Wind River basin would suggest that a blanket exemption of these aquifers was incorrect. First, the lateral extent of aquifers is significant and there are many areas in each of these aquifers that are potable and that would not be impacted by oil and gas activities simply because of their geographic location in relation to oil and gas activity areas. Secondly, the Wind River basin is characterized by extensive artesian pressures which make it entirely possible for improperly disposed of fluids to migrate to the surface and contaminate upper potable aquifers. Since many of the injection wells are actually converted production wells, the chemical reactions between the injected fluid and the well casing itself cause mechanical breakdown of the casing and thus provides an avenue for the migration of fluids. With over 456 drinking water wells located on the reservation, the potential threat to tribal water supplies is clear.

The tribes were never informed of EPA's action to exempt aquifers on the reservation from regulation, except by the notice in the Federal Register. Additionally, EPA has admitted that there was not enough information on ground water, well construction or injection activities in the basin to have made this decision (Tom Pike, EPA region 8). Finally, virtually no field work was conducted in the process of making the exemption decision.

4. Level of Funding for Tribal Programs

The level of funding committed to the development of tribal environmental programs is too low for effective program development. For example, the nation-wide funding for the development of a tribal clean lakes program is only $225,000; for the Wind River Indian Reservation, with over 147 lakes, this is wholly inadequate. The UIC program funding is also low, considering the nature of the process and the expense involved in sampling, testing wells and analysis. Nation wide funding for this program is less than $ 800,000 and is again wholly inadequate. Unless substantial funding is made available, the deterioration of tribal land, water and air resources is sure to follow. At this point, the tribes are given just about enough money to fail.

5. Summary

While this document has described only a few instances of tribal environmental concerns, it is important to recognize that many of the 300 tribes across the country face similar, if not more severe, environmental problems. The ultimate challenge before the tribes is the development of programs that protect and manage reservation resources for future generations. Without the financial and technical commitment of federal agencies, tribes will be severely handicapped in this effort. The state of environmental affairs on Indian lands necessitates immediate action and commitment on the part of EPA.

ADDRESSING ENVIRONMENTAL PROBLEMS ON INDIAN LANDS: ISSUES OF TRIBAL SOVEREIGNTY VERSUS STATE AND EPA REGULATORY AUTHORITY

By Karen R. Breslin

DENVER—Prior to their recent amendment, several key environmental laws were largely silent on the role of Indian governments in protecting their lands from environmental damage, or they regarded tribal governments as subdivisions of other governments, as does the Resource Conservation and Recovery Act.

David Harrison, senior policy analyst for the Council of Energy Resource Tribes, said this regulatory regime resulted in "yawning gaps" in environmental protection of Indian country.

Exploitation of mineral wealth beneath the vast lands of the Navajo Nation, for example, has created environmental problems such as abandoned uranium mines and mine tailings and has contaminated ground and surface waters. Yet before the amendment of the statutes, Navajo officials lacked the authority to participate in the federal regulatory scheme, although they are responsible for the health and welfare of their people. And often, state environmental regulations have no force on Indian land.

Congress sought to address these "yawning gaps" when it amended the Comprehensive Environmental Response, Compensation, and Liability Act, the Safe Drinking Water Act, and the Clean Water Act, which now call for tribes to be treated, with some qualifications, as states.

Under Clean Water Act amendments enacted in 1987, Indian governments may apply for the delegated authority to set water quality standards and issue discharge permits. The Superfund Amendments and Reauthorization Act of 1986 amended CERCLA to provide that the Environmental Protection Agency shall treat Indian tribes substantially as states and to allow tribes to enter into cooperative enforcement agreements, which may include tribal claims for natural resource damages. Amendments to the Safe Drinking Water Act approved by Congress in 1986 allow tribes to apply for delegated authority to operate public water supply and underground injection control programs.

Seattle attorney Richard Du Bey, who advises numerous tribes on environmental issues, told BNA that, while tribal governments have the inherent sovereignty to use their own police powers to protect the health and welfare of their members, as well as the quality of reservation environments, "the availability of EPA-delegated programs acknowledges the tribes' ability to do so" and allows them to participate in the agency's grant programs.

Evolution in Government's Policy

The amendments reflect an evolution in the U.S. government's policy toward Indian nations, Du Bey said. Termination of federal recognition of some Indian tribes and legislation designed to divest Indians of land reflected the nature of federal policy that prevailed until the 1970s, he said. "The federal focus was to diminish tribal sovereignty and to weaken the fabric of tribal government."

Subsequently, federal policy shifted to "the twin themes of strengthening tribal governments and allowing tribes to seek their independence and develop their own economic projects," he said.

This shift is apparent in EPA's 1984 Indian Policy Statement, which says that the agency will deal with Indian governments on a "government-to-government basis."

Ernest Woods, Indian program coordinator for EPA Region VI, said tribal governments sought inclusion in the federal regulatory scheme as proper recognition of their status as governments of sovereign nations. Indian officials argue that they never forfeited their status as sovereign nations and, at the very least, should not be treated as municipal or county governments, Woods told BNA.

Without the Indian amendments, "it was just rhetoric [for EPA] to say it would deal with Indian governments as sovereign nations," Woods said. "For two decades EPA had only one partner, the states," he said. "Now there is a third partner created through [the agency's Indian] policy."

Jurisdictional Conflict

However, EPA's implementation of the Indian amendments places the agency in the midst of a jurisdictional conflict between some Western states and Indian governments, which historically have battled in federal court over taxation, zoning, and natural resource jurisdiction. Some Western state government officials have expressed concern that EPA will decide they lack jurisdiction to conduct environmental programs on Indian land, while tribal advocates have argued that only under certain circumstances is state civil jurisdiction applicable on Indian land.

The state/tribal jurisdictional conflict "is not new," Denver attorney Glenn Morris said. "States have historically attempted to usurp or diminish tribal jurisdiction, while the federal courts have consistently upheld Indian jurisdiction, especially civil jurisdiction." Morris, who teaches a course on federal Indian policy at the University of Colorado at Denver, told BNA.

Morris argued that tribal governments in fact enjoy a sovereign status "higher than that of states," citing the decision of the U.S. Court of Appeals for the Tenth Circuit in *Native American Church v. Navajo Tribal Council* (272 F2d 131, CA 10, 1959).

"What's at issue is whether that's still true," he said. "Indian governments haven't voluntarily relinquished their sovereignty, and if sovereignty is inherent, then it can't be diminished by the unilateral extension of jurisdiction by states."

Eric Eberhard, until recently an attorney in the Washington, D.C., office of Gover, Stetson, & Williams, a firm that represents tribes, said tribes sought the amendments to ensure that states did not encroach on the governmental

---

Karen Breslin is a BNA staff correspondent and is based in Denver.

Copyright © 1988 by The Bureau of National Affairs, Inc., Washington, D.C.
[illegible]

prerogative of tribes and to improve environmental protection of Indian lands.

No Defined Statutory Role For Tribes

The enforcement on Indian reservations of federal environmental standards has not been afforded "adequate attention," Eberhard said.

"A major stumbling block has been the lack of a defined statutory role for the tribal government," he added. "A number of tribes made suggestions to various members of Congress about being written into the federal environmental statutes on the same basis as states. There had been several years of efforts by EPA to determine an appropriate role for tribes in federal environmental regulation, and one of the difficulties EPA kept encountering" was the failure of the statutes "for the most part" to include Indian governments.

Eberhard said "at least" six tribes have applied to EPA for delegated authority under the Clean Air Act. "Most of the applications are three years old and have never been approved. EPA cites the lack of defined statutory authority as the reason for its inaction."

The amendments were also sought to foster "a climate of regulatory certainty, so that opportunities for economic development [on Indian land] would be enhanced," Eberhard said. Before the laws were amended, it was unclear whether federal, tribal, or state standards would apply, he said. The amendments provide "a statutory basis for reaching an answer."

Tribes also sought inclusion in the federal regulatory scheme because "there was a sense that if the tribes did not actively assert their governmental prerogatives, then the states would," Eberhard said. "There's a 200-year history of a tribal/federal relationship which doesn't permit, in general, the exercise of state jurisdiction on Indian land." The federal/tribal relationship "is a cornerstone of tribal sovereignty and one the tribes protect to the extent they can."

Washington State's View Of Jurisdiction

Washington is one state that has attempted to assert its authority over Indian lands. State officials have contested what they say is the premise of EPA's Indian policy: that a state lacks jurisdiction unless it can prove otherwise. The extent of non-Indian land ownership, and the non-Indian population that resides on a reservation, determine the extent of state jurisdiction, some Western state officials have argued.

Kenneth Eikenberry, Washington's attorney general, wrote to former Attorney General Edwin Meese and former EPA Administrator Lee M. Thomas expressing concerns about EPA's Indian policy and the implementation of the amended statutes. Eikenberry expressed concern that businesses would locate on Indian lands to avoid state environmental regulation.

"Washington has 25 different reservations, and in most of them, a large percentage of the land is occupied by non-Indians," Jim Pharris, chief of the Ecology Division, Washington State Office of Attorney General, told BNA. Non-Indian ownership of land within reservation boundaries is a result of the the General Allotment Act of 1887 (the Dawes Act), which divided up land within reservation boundaries and allotted ownership of plots to individual tribal members, Pharris said.

"Some Indians sold or lost, in various ways, the land they owned," he said. The Dawes Act reflected the federal government's policy of "assimilating the Indians and eliminating the reservations," he said.

By the 1930s, allotment ceased, Pharris said, but the policy's legacy remains. Reservations are now characterized by a "checkerboard" pattern of ownership. Some land is held in trust for the tribe as a whole, while other land is owned by non-Indians, so-called "fee" land.

Washington officials questioned whether tribes are allowed to assert authority over non-Indians—who lack representation in the tribal government. They said they fear a potential gap in environmental protection if state jurisdiction is denied and tribal governments fail to initiate environmental programs.

Regulatory Limbo?

"We don't want the gap to occur, and we think EPA is legally wrong" in assuming no state jurisdiction, Pharris said. "Our anticipation is that many Washington tribes may not apply for recognition. That puts our regulatory program in limbo if EPA takes the position that the state doesn't have regulatory authority."

In the event EPA determines a state lacks jurisdiction, and a tribe does not seek delegated authority, EPA will then be responsible for the regulatory program. However, Pharris said that EPA "leans heavily on the state programs" and is not well-positioned to assume regulatory authority over Indian lands.

While Washington has "no argument" with the agency's objective of involving tribes in the regulatory scheme, "EPA has in some places interpreted the policy too blindly," he said. Washington officials believe the amendments were intended to recognize tribes, which wanted to begin to be involved in the federal regulatory scheme, he said. However, he added, "I don't think there was any implication in Congress passing the amendments that [Congress believes] the states didn't have regulatory authority, or weren't asserting it."

Washington has never asserted jurisdiction over Indians on Indian land, he added. "We've always recognized that tribal treaty rights and the [tribal] relationship with the federal government pretty much precluded regulation over Indians themselves, but not over non-Indian land and non-Indians. We've always asserted jurisdiction."

Idaho Takes Similar Stand

Clive Strong, chief of the natural resource division, Office of Idaho Attorney General, echoed Pharris' arguments.

Both officials cited *Montana v. U.S.* (450 U.S. 544, 1981), a hunting and fishing regulation case in which the Supreme Court decided that tribal officials lack the authority to regulate hunting and fishing by non-Indians on non-Indian owned land.

Strong said EPA's Indian policy "starts with the premise that states have no jurisdiction within the boundaries of the reservation, and that doesn't appropriately reflect the status of the case law." Although courts reject state jurisdiction over trust lands, they have in some cases held that states have jurisdiction over fee lands, he said.

Like Strong and Pharris, attorney Jeff Goltz of the Seattle firm of Lane, Powell, Moss & Miller said he believes EPA has incorrectly adopted a position of no state jurisdiction. He said this doctrine will complicate the regulatory affairs of businesses.

Industrial concerns on Indian lands have operated under state law "for decades," Goltz told BNA. EPA's position may result in a "jurisdictional no-man's land" that will confound the regulatory affairs of industry and discourage business enterprises on reservations, he said, noting that economic development of depressed reservation economies is also a federal policy objective.

"The amendments may ultimately fill in the [jurisdictional] gap, but only after a long rule-making process. In the meantime, in the interim, the state should continue its jurisdiction," he argued.

Goltz also expressed concern about the sovereign immunity of tribes. Regulated entities obviously can sue Washington state, he noted, while "tribes haven't uniformly waived sovereign immunity."

Lack Of State Jurisdiction Called Appropriate

Ralph Johnson, professor of law at the University of Washington, told BNA that regulation of the environment is crucial to the health and welfare of tribal members and, therefore, the premise that states lack jurisdiction is appropriate.

In the 1832 case of *Worcester v. Georgia* (31 U.S. 515, 1832), the sovereignty of Indian nations was held by the Supreme Court to be an "absolute bar" to exercise of state jurisdiction, Johnson noted. However, Johnson added, this doctrine has been modified by congressional initiatives that have expressly granted certain states jurisdiction (PL-280), and by court cases that have carved out exceptions to the absolute bar to state jurisdiction.

Tribal criminal jurisdiction over non-Indians was rejected by the Supreme Court in a 1978 case (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 1978). In *McClanahan v. Arizona State Tax Commission* (411 U.S. 164, 1973), the court said state civil jurisdiction may be permitted unless federal law pre-empts the state law, Johnson said.

In a letter to EPA, Johnson and several other law professors cited *California v. Cabazon Band of Mission Indians* (107 SCt 1083, 1987) as a rebuttal to the analysis of Washington state. In the case, the Supreme Court held that state jurisdiction is pre-empted if it interfered with federal or tribal interests, unless state interests were sufficient to justify assertion of state jurisdiction. However, the court said the issue should be considered within the context of traditional notions of tribal sovereignty and the congressional objective of self-government.

When state or local governments seek to regulate non-Indians residing on reservations, "you find the Supreme Court saying in a variety of cases that states do have jurisdiction on reservations," Johnson told BNA.

However, tribes argue that states lack jurisdiction over environmental matters because environmental regulation will affect the health and welfare of tribal members, Johnson said. "It's not strictly a non-Indian question."

Case Law On Jurisdiction Over Environment

While state jurisdiction on Indian land is an issue that has been litigated in other contexts, such as fishing and hunting regulation, or taxation cases, case law on the issue in the environmental context is scant. Only one case, *Washington v. EPA* (752 F2d 1465, 22 ERC 1810, CA9, 1985), deals strictly with the issue of state jurisdiction. The U.S. Court of Appeals for the Ninth Circuit affirmed EPA's disapproval of Washington's application to regulate Indians and non-Indians within reservation boundaries under its RCRA program.

Two other significant cases pertain to EPA actions regarding environmental regulation on Indian lands. In *Nance v. EPA* (645 F2d 701, 16 ERC 1497, 1981), the Ninth Circuit upheld EPA's approval of the Northern Cheyenne's redesignation of their reservation's airshed from Class II to Class I under the Clean Air Act's provisions designed to prevent significant deterioration of air quality in areas that are cleaner than required by the national secondary air quality standard. A Class I area is one under which very little deterioration—and hence very little development—is allowed. EPA's action was opposed by certain mining companies and by the Crow Tribe, which feared the redesignation would impinge on strip mining activities on Crow land, according to EPA attorney Deborah Gates.

The Clean Air Act was subsequently amended to allow tribes to redesignate reservation airsheds.

In *Phillips Petroleum Co. v. EPA* (803 F2d 545, 25 ERC 1033, CA10, 1986), Phillips challenged EPA's promulgation of an underground injection control program implemented by the Osage Tribe of Oklahoma. The Tenth Circuit, Gates told BNA, upheld EPA's action, stating that Congress intended EPA to protect all lands, including Indian lands.

In 1986, the agency denied the state of Washington's application to operate the underground injection control program on Indian reservations (51 FR 43080). Washington argued that once EPA approved a state's program, that the program applied to all persons conducting regulated activities, including those operating on Indian lands.

EPA cited the court's decision in *Washington v. EPA* and further argued that the state's assertion of jurisdiction under the Safe Drinking Water Act was weaker than its earlier assertion under RCRA because of the 1986 SDWA amendments.

"The 1986 amendments reflect congressional intent to promote tribal regulation of underground injection control activities on Indian land with federal approval," it said. The agency also said that Washington failed to show that its proposed regulatory activity was not pre-empted by federal or tribal interests, and that state regulation would not infringe on tribal sovereignty. States must meet this "two-prong test" to establish jurisdiction, EPA said.

Jurisdiction Over Water Resources

Du Bey argued that Section 518 of the Clean Water Act stipulates that tribes have jurisdiction over water resources within reservation boundaries, regardless of who owns the land.

"As far as the Clean Water Act is concerned, the federal statute serves to effectively pre-empt state jurisdiction from intruding within the exterior boundaries of the Indian reservation. Where EPA has jurisdiction to implement a program, or where a tribe has received delegation, federal pre-emption precludes a state from asserting jurisdiction," he said.

"Washington doesn't have jurisdiction within reservation boundaries, notwithstanding the fact that they have asserted jurisdiction, or may have some arrangement with tribes to do things cooperatively. For a state to claim it may unilaterally assert jurisdiction under environmental programs is an argument they haven't won yet. They say it because they have to, because there's tremendous political pressure from the white community" which fears it will not be "treated fairly" by tribal governments, Du Bey said.

However, he added that he had not seen any example that tribal governments were acting improperly. Tribal governments are protective of their governmental prerogative, he said, and will not do anything to undermine it by exercising their authority arbitrarily.

Concerns regarding the sovereign immunity of tribes are resolved by the existence of administrative procedures for the review of tribal regulatory activities, Du Bey also argued. Once administrative remedies are exhausted, a regulated entity could seek judicial review or a declaratory judgment from tribal courts. "Sovereign immunity isn't really an issue because of the administrative process, and the opportunity for judicial review," he said.

Copyright © 1989 by The Bureau of National Affairs, Inc., Washington, D.C.
0013-9211/89/$0+.50

"For those tribes which have seen fit to implement an environmental program and have developed an administrative process to provide for due process, the parade of horrible arguments [against tribal jurisdiction] will fall away," he said.

Du Bey also disputed the notion that tribal governments will not adequately protect the environment. The tribal land base "is the very thing holding [Indian nations] together as a people," he said. Moreover, the hazardous waste sites on the national priorities list for cleanup under CERCLA were created by non-Indians, yet non-Indians frequently argue "we know better" how to regulate the environment, he said.

Concerns Relating To Non-Indian Interests

EPA General Counsel Lawrence J. Jensen told BNA that the agency "recognizes concerns over jurisdiction are always there when it comes to [regulating] non-Indians on reservations, whether it's environmental regulation or something else." He noted that "as a general rule, the less non-Indian interest in terms of land ownership, the less claim the state has to some sort of jurisdiction." However, where states have asserted jurisdiction and issued permits, "we'll obviously have to look at that [jurisdiction] if a tribe applies to us to manage" an environmental program. "We'll have to work through the status of any outstanding permits." EPA has drafted regulations "which will give states the opportunity to voice concerns before we make any judgment about administration of environmental programs by Indian tribes."

Jensen said meetings have been held among EPA, state, and tribal representatives, at which the jurisdictional issue has been discussed. "Once you walk through the fact that the Clean Water Act and the Safe Drinking Water Act contemplate some tribes having jurisdiction for federal environmental programs, and explain the procedures, my sense is that the anxieties seem to be eased somewhat."

In a September 1988 letter to Oregon's attorney general, Jensen responded to specific questions arising from the jurisdictional issue. Regarding what standards will apply where a tribe has not applied for or not yet received delegated authority, Jensen said EPA will assume "without deciding" that state standards that have been applied to Indian reservations will remain applicable until a tribe receives authorization or until EPA determines that a state lacks jurisdiction.

Similarly, National Pollutant Discharge Elimination System permits issued by states under the Clean Water Act will be assumed to be valid until EPA decides otherwise, or until a tribe receives delegated authority. Where states have not issued permits, EPA will continue to do so, Jensen wrote.

State, Federal, Tribal Agreements

Regarding environmental programs under statutes that do not authorize EPA to treat tribes as states, Jensen said administration of the programs should be accomplished through state, federal, and tribal cooperative agreements. In the absence of a cooperative agreement, EPA will continue to implement those programs "in close consultation" with tribes.

Further, EPA under its "implicit authority" in the environmental statutes may authorize a tribe to administer federal environmental programs absent specific language authorizing the agency to do so, Jensen said. However, such a delegation will require a showing by a tribe that its jurisdiction is appropriate, he said. Similarly, state assertions of jurisdiction will require a showing by the state that its jurisdiction is appropriate.

The notice detailing the agency's rejection of Washington's application to operate its underground injection control program on Indian land under the Safe Drinking Water Act serves "as an example of how EPA analyzes state claims of jurisdiction on Indian lands in accordance with applicable principles of federal environmental and Indian law," Jensen wrote.

Criteria Under SDWA

The Safe Drinking Water Act was the first federal environmental statute to be amended to treat Indian governments as states. The 1986 amendments established four criteria that must be met before tribes can be treated as states, according to Al Havinga, an environmental protection specialist with EPA's Criteria and Standards Division.

A tribe must be federally recognized, and "substantial governing powers" must rest with a tribal government. The tribe must also have jurisdiction over the water system or injection well for which it seeks delegated authority, and it must be capable of administering a public water supply or injection control program, Havinga said.

Further, a tribe must demonstrate that it maintains the institutional mechanisms necessary to conduct executive, legislative, and judicial functions, he said. "In some tribes all [governmental functions] are rolled into one organization unit," he said. Tribes must possess the governmental functions "but not in the forms we usually think of," he said.

In drafting the SDWA regulations for tribal delegation, the agency sought to avoid becoming entangled in jurisdictional questions, Havinga said. "I think we've tried to come up with a system that doesn't put EPA in the middle of trying to resolve those jurisdictional disputes. We're also trying to send a statement that though we're not presuming that a tribe has jurisdiction within a reservation, generally that's the case," he said. "We have to look at jurisdiction on a case-by-case basis."

On Sept. 26, 1988, EPA published its final rule for treating tribes as states and delegating to tribes authority to operate the underground injection control and public water supply programs under SDWA (53 FR 37396).

The rule sets up a three-step process under which tribes will receive enforcement authority. A tribe must first seek an agency determination that it will be treated as a state. A tribe may then apply for grants to develop an underground injection and public water supply program. Following development of a program, it then applies for primacy.

Within 30 days following submission of a tribal application for state designation, EPA must notify surrounding jurisdictions, including states, about the tribe's jurisdictional claims. The governmental entities then have 30 days to comment. If states or other jurisdictions contest a tribe's jurisdiction, the EPA administrator will evaluate the validity of the comments, and will render a decision following consultation with the secretary of interior, Havinga told BNA. "If the administrator concludes that a tribe has not adequately demonstrated jurisdiction, tribal primacy may be restricted accordingly," he explained. Such a determination affects only tribal jurisdiction claims under the public water supply and underground injection control programs. "The administrator is only required to make determinations of jurisdiction relative to those two programs," he said, "it doesn't spill over into other types of jurisdictional issues."

Resolving Jurisdictional Claims Under CWA

Draft regulations for tribal delegation under the Clean Water Act also contain procedures for resolving jurisdictional questions, according to David Moon, an environmental engineer with EPA's Office of Water Regulation. "Some states believe they have authority over reservations," Moon said. "Where a tribe can't demonstrate that it has authority, EPA won't treat it as a state."

Like the SDWA final rule for the public water supply and underground injection control program, the draft rule for the treatment of states for the water quality standards program will require a statement from a tribe's legal officer outlining the legal basis for the tribe's jurisdictional claim, Moon said. Challenges to tribal jurisdiction will be resolved by the regional administrator, following consultation with the secretary of interior, under the draft rule.

The draft rule also contains procedures for resolving disputes over water quality standards, Moon said. The dispute resolution process would be triggered by an application from a tribe or state, he said. EPA would then "attempt under certain circumstances to resolve [the dispute] either by mediation or non-binding arbitration," he said. "We're planning to play a role mainly as facilitator." If EPA is unable to mediate the dispute, it may appoint, in consultation with the parties, an arbitrator or an arbitration panel, which would issue a non-binding recommendation. The agency is still seeking consensus on the proposed rule from members of the working group that is helping draft the rule. However, Moon said he expects the proposed rule will be published in April or May 1989.

Don MacIntyre, chief legal counsel for the Montana Department of Natural Resources and a member of the EPA working group on regulations to be promulgated under Section 518 of the Clean Water Act, said EPA should allow the parties to choose their own mediator, or arbitrator, and settle the dispute between themselves. The agency should then review the result for its compliance with the Water Act, he said.

He questioned whether EPA can "treat the parties fairly," given its trust responsibility to the tribes. MacIntyre said EPA's responsibility to be impartial would conflict with its trust responsibility to the tribes. "Those can be mutually exclusive duties," he argued.

Disproportionate Threat From Water Pollution

Indian country is disproportionately threatened by water pollution because of the exploitation of mineral deposits found on Indian land, according to David Getches, a professor at the University of Colorado School of Law. In an article for the school's law review, Getches wrote that tribal land bases are often only "marginally" adequate to sustain the tribal population. The "consequences of water pollution can be especially severe for Indian tribes," particularly for a tribe whose culture and economy is reliant upon fishing resources, he wrote.

He also cited the 1984 EPA study of environmental issues on Indian land conducted by the Council of Energy Resource Tribes, in which 94 percent of the tribes that responded indicated they relied on ground water for their drinking water supply. "Protection of a healthy environment is especially important to Indians, who have the worst health statistics of any identifiable group of Americans," Getches wrote.

Such concerns have prompted the Confederated Colville Tribes of Washington to pursue water quality standards that are "slightly" more stringent than state standards, EPA Region X attorney Gates told BNA. The Colville tribes sought the standards prior to the amendments to the Clean Water Act, she noted, so EPA promulgated standards sought by the tribe, marking the first time the agency has promulgated water quality standards sought by a tribal government.

While Washington state initially opposed EPA's promulgation of the standards sought by Colville tribes, the standards were developed as a "cooperative effort" between Washington, EPA, and the Colville tribes, Gates said.

The Colville Confederated Tribes have "historically been concerned about water protection," she noted, because of tribal fisheries on the reservation, and because of efforts by the tribe to develop recreational enterprises.

Water quality standards on the reservation are enforced through a cooperative agreement with EPA, according to Du Bey, who also serves as an attorney for the Colville Confederated Tribes. Under the cooperative agreement, EPA will review discharge permits and reissue them as federal permits.

The Colville Confederated Tribes are content with the cooperative agreement they have obtained and will not seek delegated authority to issue discharge permits, according to Gary Passmore, water administrator and hydrologist with the Colville Confederated Tribes.

Although the tribal government sought federal promulgation of its standards before the amendment of the Water Act, Passmore said, once it was amended, the tribe determined that it would continue the course of seeking federal rule-making, rather than seek delegated authority. He noted that the tribal government promulgated the standards as a matter of tribal law in 1985.

"We didn't think it would be appropriate to maintain NPDES authority for writing a permit every couple of years," Passmore said. "It's too expensive." State-issued permits have mostly expired, he said, and EPA will be rewriting them.

Water Issues Facing Tribes in EPA Region VI

Woods, the Indian programs manager for EPA Region VI, told BNA that water quality is the greatest environmental problem facing tribes located within the region, which encompasses New Mexico, Oklahoma, Texas, Louisiana, and Arkansas. Sixty-six federally recognized tribes reside within the region, the highest number found in any of the agency's regional divisions, Woods said.

Water quality degradation stems from point and non-point sources, he said, specifically citing run-off from pesticides and leaching from solid waste landfills. Drinking water supplies are often at risk, he noted. Midnight dumping on reservations also contributes to ground water contamination, he said, as tanker trucks loaded with hazardous chemicals often unload their tanks on isolated, rural Indian lands.

Woods said environmental protection needs on Indian reservations have often "fallen through the cracks," as a result of jurisdictional confusion. While population density on Indian land is low, the land area is sizable. He said the 16-million-acre Navajo Nation, for example, is larger than some New England states.

EPA has long based the priority of its efforts on the basis of population, he said. "But EPA took the position that it can't sweep [Indian issues] under the rug." Indian country encompasses "tremendously large areas with gargantuan environmental problems, which in the case of the Navajo Nation, have simply been ignored for 10 or 12 years."

Patrick Antonio, acting director of the Navajo Environmental Protection Administration, cited ground and surface water contamination from radioactive and other hazardous wastes as the main environmental problem confronting Navajos. Antonio said residents near a superfund site in Churchrock, N.M., question whether their water is safe to drink. Antonio noted that in some instances, ground water in the area has been declared by health officials as safe only for livestock.

Copyright © 1989 by The Bureau of National Affairs, Inc., Washington, D.C.

0013-9211/89/$0+.50

Navajo Officials Identifying Waste Sites

Navajo officials are in the process of identifying hazardous waste sites, according to JoAnne Manygoats, director of the Navajo superfund office.

An abandoned refinery at Prewitt, N.M., has been proposed for inclusion on the superfund national priorities list. The uranium mine and milling complex near Churchrock was the subject of a remedial investigation/feasibility study completed by EPA in August 1988, according to Sandra Sevier, spokeswoman for EPA Region VI.

The site includes tailings impoundments that are approximately 15 to 20 feet deep and encompass about 100 acres. Leaching from the tailings threatens the shallow and bedrock aquifers near the site, Sevier said. EPA is negotiating with United Nuclear Corp., which operated the site, on implementation of the remedy.

Additionally, Manygoats said, Navajo officials have identified approximately 33 hazardous waste sites in New Mexico, including abandoned uranium mine sites and areas contaminated with a pesticide that was used to delouse sheep and goats. She said she expects more sites to be identified.

The office is in the process of preparing a preliminary assessment of the sites, Manygoats added.

Navajo officials have recently completed with EPA a superfund memorandum of agreement that stipulates the roles of the agency and the Navajo government's superfund office in the identification and assessment of superfund sites.

Under the agreement, Navajo and EPA officials have determined that a lead agency will be designated when it is determined that a site may be proposed for inclusion on the NPL. Whether a site will be a tribal lead or an EPA lead will hinge on numerous factors, including the work load and staffing of the two agencies, past involvement at the site, fiscal management capability, contracting capability, and the "ability to respond to the other agency's concerns."

Manygoats said she is optimistic that the hazardous waste sites on the reservation will be addressed as a result of the superfund amendments and the superfund memorandum of agreement. The Navajo tribal council is more cognizant of the tribe's hazardous waste problems, she said. "I know they pay more attention than they have in the past." And she said she believes that EPA will involve itself in Navajo sites as long "as the tribe is aggressive in implementing superfund."

EPA, St. Regis Mohawk Agreement in Works

A superfund cooperative agreement is being forged between EPA and the St. Regis Mohawk tribal government. The St. Regis Mohawk reserve borders an aluminum casting facility owned by General Motors. The GM Foundry site is listed on the NPL, and GM is conducting a RI/FS for the site, which encompasses areas impacted by the GM facility, including St. Regis land.

Soil samples at the foundry have shown levels of polychlorinated biphenyls in excess of several thousand parts per million, according to Christine Visnic, EPA project manager for the GM site. Soil samples from the reserve indicated the presence of PCBs in concentrations of less than 10 ppm. However, sediment samples from the St. Lawrence River, which is a food source for the Mohawks, revealed concentrations of up to 4,500 ppm.

Visnic said St. Regis representatives attend all meetings about the site and receive the latest reports from GM as promptly as does EPA. While EPA is the lead agency for the site, and oversees the work completed by GM, the cooperative agreement contemplated by the parties will install the Mohawks in a similar oversight capacity, according to Visnic. "What the cooperative agreement will do is formalize what's been going on informally," she said.

The Mohawks have assisted in the sampling of the St. Lawrence River, she said, and have developed a risk assessment that they believe will correct inadequacies identified by EPA in GM's health risk assessment. The GM assessment was based on the amount of fish that would be consumed by a sport fisherman. "Mohawks consume several times that," she noted. The Mohawks proposed a study that samples the fish and wildlife, as well as mother's breast milk.

Jim Ransom, director of the St. Regis Mohawk environmental program, told BNA that in 1986 an advisory was issued warning children under the age of 15 and women of child-bearing age not to eat fish from the St. Lawrence River. But, he added, many continue to do so. Adult males were told to limit their fish consumption to one fish per week. But "people have been eating fish all their lives, and the advisory has had little effect."

Ransom said his office receives reports of health effects which are suspected to stem from PCB contamination. "There are reports of people observing what they think are health effects," including midwives who are reporting birth defects.

"One of the problems we think we're having is that the main chemical affects the immunological system," which may result in colds and other illnesses, he said. However, whether these illnesses can be attributed to "the main chemical"—PCBs—is uncertain, he noted. The tribe is undertaking a morbidity and mortality study in conjunction with the state of New York to better determine the health risks posed by the contamination.

The tribe is also in the process of determining how to promulgate applicable, relevant and appropriate requirements that dictate the level of cleanup under SARA.

"We've found PCBs in excess of 2,000 ppm on reservation property immediately down river from the GM site," Ransom noted, "so we want to develop our own ARARs that would protect human health."

Du Bey, who also acts as attorney for the Mohawks, told BNA that the tribe seeks a cleanup standard consistent with the background level of PCBs. "If the background level is less than 1 ppm, then [the tribal standard] will be whatever is the background level," he said.

Because SARA requires tribes to be treated as states, EPA has determined that tribally promulgated ARARs will be complied with at superfund cleanups on Indian lands, according to EPA's Marilyn Stone, who is in charge of ARAR compliance. State ARARs will not be applicable on Indian land, she said.

Walt Kovalick, deputy director of EPA's Office of Emergency and Remedial Response, told BNA that the agency lacks an exact tally of superfund sites affecting Indian land, but he estimated that superfund sites on or adjacent to Indian land number about 24. More sites may discovered, he noted, adding that until SARA, the agency lacked an "arrangement to work with Indian tribes" on site identification.

Kovalick said he welcomes tribal participation in the superfund program and believes the additional manpower will be advantageous "from a public health and environmental protection point of view."

Barriers To Participation in Federal Scheme

Tribal representatives, however, caution that lack of resources may constrain tribal participation in the federal regulatory scheme.

Harrison, the attorney for the Council of Energy Resource Tribes, said that lack of resources is the biggest barrier to such participation. He added that Indian officials believe some of the requirements which tribes must meet to obtain state treatment are excessively burdensome. "There's some unnecessary red tape and massive paper work" involved in meeting the requirements necessary to obtain grant monies, he said.

Nevertheless, Harrison said he expects tribes to take advantage of the new statutory provisions, noting that tribes from "coast to coast" have been "weighing in to express their concerns with the issue," and have been "active in dealing with the agency in its drafting of the implementing regulations."

Tribal attorney Eberhard also cited resource constraints as the major barrier to tribal participation. "If you look at the implementation of EPA programs among states, millions upon millions were spent in the implementation effort by the federal government, and there's not likely to be that kind of federal commitment to implementation of environmental programs on Indian land," Eberhard said.

Tribal governments lag far behind the states in technical expertise, he noted. "But I see that as primarily a money problem. If the funding was available, there's no doubt the tribes could acquire the technical expertise necessary to regulate the environment," he said. "Even with the lack of money, some tribes will acquire it through their own resources and the existing, limited federal resources." However, "in terms of a nationwide effort, it's clear that lack of financial resources is the most significant problem confronting the tribes."

States, Indians Willing To Work Together

As for the dispute between states and tribes over jurisdiction, both sides asserted their willingness to work cooperatively to resolve differences. Tribes seeking to engage in environmental regulation do not "have on their agenda fighting with the states," but they do seek a regulatory function "consistent with their sovereign authority," Eberhard said. "People tend to overlook the record of cooperation between tribes and states and tend to emphasize the conflict," he said.

Du Bey noted that Washington officials "have made some positive strides" in seeking cooperation with tribal governments, which "hopefully will indicate that a stronger relationship will develop" between the state and Indian governments.

Pharris, with Washington's Office of the Attorney General, said state officials "welcome a cooperative effort with the tribes. We're trying to keep the lines of communication open."

Idaho's Strong agreed: "Tribes are sovereign, and deserve to be treated as such, as are states. From the state perspective, it's important to work together to resolve the question of [jurisdiction on] fee land, as opposed to EPA being the decision-maker."